

Original filed in COA 7/24/2017
Revised to remove juvenile's name 10/11/2018
See Deputy Clerk's 10/11/2018 letter

No. 95542-5

NO. 76258-3-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

B.O.J.,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The sentence imposed on B.O.J. is contrary to the goals of the Juvenile Justice Act.

The prosecutor argues the Juvenile Justice Act authorizes incarceration for any youth accused of a crime. Respondent's Brief at 7. There should, however, be no dispute that incarcerating juveniles for minor offenses is contrary to the goals of the Juvenile Justice Act, even if the Act authorizes it.

Incarcerating juveniles has a negative and counterproductive impact. *See Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). It is estimated that a third of young children engage in delinquent behavior before they grow up and mature. Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, 6 (2011).¹ When children are incarcerated, the patterns that lead to maturation are interrupted and delayed. *The Dangers of Detention*, at 6.

And when children are incarcerated together, they are exposed to delinquency, by contributing negatively to each other's development.

¹ http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf

See James Snyder, et. al., *Peer Deviancy Training and Peer Coercion: Dual Processes Associated With Early-Onset Conduct Problems* (2008). This can result in higher levels of substance abuse, difficulty in school, violence, and difficult adjusting throughout adulthood in juveniles. *The Dangers of Detention*, at 6 (citing Thomas J. Dishion, et. al., *When Interventions Harm: Peer Groups and Problem Behavior* (1999)).²

Incarcerating juveniles also leads to higher levels of adult incarceration. See Joseph Doyle, et. al., *Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-assigned Judges* (2015).³ Incarceration is not more effective than probation or sentencing alternatives. The Annie E. Casey Foundation, *No Place for Kids: The Case for Reducing Juvenile Incarceration*, 12 (2011). Incarceration may actually increase recidivism. *Id.*; Office of Juvenile Justice and Delinquency Programs, *Highlights from Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders*, 2 (2010).⁴ This is especially true for juveniles like B.O.J., as evidence

²https://www.researchgate.net/publication/12789140_When_Interventions_Harm_Peer_Groups_and_Problem_Behavior

³http://www.mit.edu/~jjdoyle/aizer_doyle_juvenile_incarceration_january2015.pdf

⁴<http://www.pathwaysstudy.pitt.edu/documents/Highlights%20from%20the%20Pathways%20to%20Desistance%20Study.pdf>

shows that incarcerating youth who commit low-level crimes makes it more likely they will reoffend than if they were placed in the community. *Id.*; see Center on Juvenile and Criminal Justice, *Study: Long-term Juvenile Incarceration Fails to Decrease Reoffending Rates* (2012).⁵

Finally, incarceration exacerbates any problems the juveniles may already be suffering. A majority suffer from mental health issues, drug, and alcohol dependency. City of Seattle, Resolution 31614, Legislation Details (With Text), 4 (2015).⁶ Ninety percent of the girls have been physically, sexually or emotionally abused. *Id.* When they are incarcerated, the abuse is not likely to stop. Holbrook Moore, *AP: 13K Claims of Abuse in Juvenile Detention Since '04* (2008).⁷

2. The trial court's decision to impose a manifest injustice sentence should be reversed.

a. The evidence does not establish a manifest injustice sentence was required to meet B.O.J.'s needs.

The prosecutor argues a manifest injustice sentence was required to meet B.O.J.'s needs. Respondent's Brief at 8. This Court

⁵ <http://www.cjcj.org/news/5476>

⁶ <https://seattle.legistar.com/View.ashx?M=F&ID=4019767&GUID=7C099120-9DED-4455-B5F9-81F0AA0D25E5>

⁷ https://usatoday30.usatoday.com/news/nation/2008-03-02-juvenile-detention_N.htm

should find to the contrary. A sentence within the standard range would have achieved the goals of the Juvenile Justice Act, including the goal of rehabilitation. *State v. Tai N.*, 127 Wn. App. 733, 741, 113 P.3d 19 (2005). This Court should reverse the trial court's finding that a manifest injustice sentence was properly imposed.

To impose a manifest injustice sentence, a court must determine a disposition within the standard range would "effectuate a manifest injustice." RCW 13.40.160(2). Clear and convincing evidence must support a ruling in favor of a manifest injustice disposition. *Id.* A manifest injustice sentence is excessive when it cannot be justified by a reasonable view of the evidence. *State v. Strong*, 23 Wn. App. 789, 795, 599 P.2d (1979). To be upheld, a reviewing court must find (1) the juvenile court's reasons are supported by the record, (2) those reasons clearly and convincingly support the conclusion that a disposition within the standard range would constitute a manifest injustice sentence, and (3) the sentence is neither clearly too lenient nor clearly too excessive. RCW 13.40.230(2); *State v. Duncan*, 90 Wn. App. 808, 812, 960 P.2d 941 (1998).

B.O.J. lacked the criminal history that justifies a maximum sentence for her offenses. CP 40. She has no felony convictions and has

only been convicted of property crimes, false statements, and misdemeanor assault. CP 40. B.O.J.'s crimes are for low-level offenses. CP 40. Her history does not support a sentence outside the standard range.

b. The court relied on improper factors to impose a manifest injustice sentence.

The prosecutor argues the court may consider relevant and material information when imposing a manifest injustice sentence. Respondent's Brief at 12. Both case law and statutory limitations on when a manifest injustice sentence may be imposed say otherwise.

The court intended to provide B.O.J. with a "stable" environment to help her get drug treatment. RP 30-31; CP 40. However, the court's finding B.O.J. had not had success in the community failed to acknowledge how her underlying trauma had not been addressed by the government agencies charged with helping her. CP 40. Their failure does not justify a B.O.J.'s manifest injustice sentence. Without other substantial and compelling reasons to justify the sentence, especially where the court places considerable weight on this factor, remand for resentencing is appropriate. *See, e.g., State v. Fisher*, 108 Wn.2d 419, 739 P.2d 683 (1987).

The court further erroneously considered the fact that B.O.J. was a dependent. A juvenile court cannot consider a juvenile's economic circumstances and factors indicating that a child is dependent when determining a child's sentence. RCW 13.40.150(4)(d) and (e). When the court imposed its sentence, it characterized incarceration as a way to provide B.O.J. with "a housing option." RP 20. This is a legal error and should never weigh in favor of a manifest injustice sentence. Remand is appropriate.

c. The sentence imposed by the trial court was clearly excessive.

The prosecutor argues the sentence was not clearly excessive. Respondent's Brief at 13. This Court should find that court imposition of the maximum sentence for two shoplifting offenses, where B.O.J. had limited history was clearly excessive and order remand.

B.O.J. received an extraordinarily high sentence for her crime. Less than one percent of all persons convicted for offenses like shoplifting receive institutional sentences. Juvenile Rehabilitation Administration, *Demographic Snapshot on 1/11/2016*, 5 (2016).⁸ For

⁸ Available at <https://www.dshs.wa.gov/sites/default/files/JJRA/jr/documents/Reports/2016DemographicsOn1-11-16.pdf>

all offenders who are sentenced to the institution, the average stay is 143 days. Juvenile Rehabilitation Administration, *Average Residential Stay (In Days)* (2016).⁹ The average adult who is convicted of felony property offense serves three months. Caseload Forecast Council, *Statistical Summary of Adult Felony Sentencing*, 1 (2015).¹⁰

Not only is B.O.J. a statistical anomaly, but her incarceration for such a lengthy time is clearly unnecessary. The prosecutor argued for a thirty-six week sentence, believing this would be ample time for treatment, even if there was a delay. RP 20. This is a reasonable argument as treatment is ten weeks long. CP 41. There was no evidence before the court that it took a long time to begin treatment once a child were at the institute. A sentence well beyond the prosecutor's recommendation, and well in excess of the time needed for B.O.J.'s identified treatment needs was clearly excessive.

⁹ Available at <https://www.dshs.wa.gov/sites/default/files/JJRA/jr/documents/Reports/2016AverageLOS-FY15.pdf>

¹⁰ Available at http://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult_Stat_Sum_FY2015.pdf

3. B.O.J. is entitled for specific performance for the prosecutor's breach of her plea agreement.

The prosecutor argues they did not breach their plea agreement with B.O.J.. Respondent's Brief at 15. B.O.J. denied she had failed to comply with the conditions of her release. 11/30/16 RP 4. And although the court was not presented with evidence B.O.J. actually failed to comply, the prosecution breached its agreement. B.O.J. is entitled to specific performance of her plea agreement.

It is the government's burden to prove a defendant breached a plea agreement. *Matter of James*, 96 Wn.2d 847, 850, 640 P.2d 18 (1982). Plea agreements inherently implicate fundamental due process rights; therefore the prosecution must adhere to bargained-for terms until breach of agreement is proven by a preponderance of the evidence. *Id.* An evidentiary hearing must be held where due process must be complied with, including affording the defendant the opportunity to call witnesses. *Id.* Merely accusing a defendant of misconduct or of a violation does not relieve the State of its bargained-for duty. *Id.*; *State v. Sledge*, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997). And while the government again asserts B.O.J. breached her agreement, it offers no evidence to support this claim. Without evidence, a claim is insufficient.

The remedy for this breach is specific performance or the opportunity to withdraw the plea. *State v. Schaupp*, 111 Wn.2d 34, 41, 757 P.2d 970 (1988); *see also State v. Galeazzi*, 181 Wn. App. 1023 (2014). In B.O.J.'s case, the prosecution's relieving itself of its agreed-upon commitments, without proving by a preponderance of the evidence that B.O.J. violated the agreement, was improper. This Court should find B.O.J. is entitled to specific enforcement of the original plea agreement: six months of community supervision, eight hours of community service, and credit for time served. CP 15.

4. CONCLUSION

For reasons stated, B.O.J. is entitled to resentencing. She asks this Court to order a new hearing where B.O.J. is entitled to specific performance from the government.

DATED this 24 day of July 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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