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No. 95542-5

NO. 76258-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

B.O.J.,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
JUVENILE DEPARTMENT  
THE HONORABLE ROGER ROGOFF

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. The Juvenile Justice Act, RCW 13.40, prescribes secure detention as a sanction that advances its established purposes. The Act also prescribes standard sentencing ranges and criteria for imposing an exceptional sanction pursuant to a manifest injustice finding. The Act's purposes include ensuring accountability and proper rehabilitation. Here, the court found a manifest injustice and sentenced B.O.J. above the standard range based on her criminal history and need for mental health, drug, and alcohol treatment. Does the court's pursuit of the goals of Juvenile Justice Act present grounds for resentencing?

2. The evidence must support a manifest injustice finding clearly and convincingly. A manifest injustice finding is appropriate if there is a danger to society in light of the purposes of the Juvenile Justice Act. Here, B.O.J. admits needing treatment, has failed prior attempts at treatment while not in detention, and has numerous criminal referrals for theft of liquor. B.O.J. also admits to breaking things when angry, has diagnoses of Post-Traumatic Stress Disorder (PTSD) and Conduct Disorder, shows indicators of Narcissistic Disorder and Borderline Personality Disorder, and has received no mental health treatment or services.

Was the trial court's manifest injustice finding clearly and convincingly supported by the evidence?

3. The trial court may consider undocumented police contacts at disposition if the court deems the information relevant and material. Here, the court considered uncharged and dismissed referrals, included in B.O.J.'s written record, in its manifest injustice finding. Was consideration of these factors proper?

4. The trial court has broad discretion in determining the appropriate disposition pursuant to a manifest. The court's determination is proper absent an abuse of discretion. Here, the court based its disposition on the need for accountability and treatment. Did the court abuse its discretion in imposing 42 to 52 weeks of secure detention?

5. When the State proves a violation of conditions of release between plea and disposition by a preponderance of the evidence, the State may recommend a sentence greater than that previously agreed upon. Here, B.O.J. fled from her approved residence, violating an explicit condition of release. The violation was addressed by open court and B.O.J. did not deny the allegation or present evidence to the contrary. Did the State violate its plea agreement by increasing its recommended sentence?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

On June 29, 2016, the State charged B.O.J. with one count of Theft in the Third Degree and one count of Minor in Possession of Liquor. CP 1-2.<sup>1</sup> The State subsequently amended the information to charge two counts of Theft in the Third Degree pursuant to a plea agreement. CP 6-7. B.O.J. pled guilty as amended on November 15, 2016. CP 8-14. Disposition was scheduled for January 2017. RP 18.<sup>2</sup> On November 30, 2016, a Violation of Court Order warrant issued because B.O.J. was no longer residing at her approved placement. CP 40; Finding of Fact 13.<sup>3</sup> On December 13, 2016, the State recommended B.O.J. be sentenced to 27-36 weeks secure detention; the Juvenile Probation Counselor recommended 52 weeks secure detention; the trial court imposed a sentence of 42-52 weeks secure detention. RP 20, 37; CP 18-19; Probation Report 1.

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<sup>1</sup> Clerk's Papers at 1-2.

<sup>2</sup> Report of Proceedings at 18.

<sup>3</sup> The State adopts Appellant's citation conventions for the ease of the court.

## 2. SUBSTANTIVE FACTS

On April 30, 2016, Loss Prevention Associates Courtney Rayback and Joshua Buel saw B.O.J. enter Safeway with a backpack and duffel bag. CP 3-4. They watched as B.O.J. walked to the alcohol aisle and placed five bottles of liquor in the duffel bag. Id. B.O.J. then placed six additional bottles of liquor in the backpack. Id. B.O.J. proceeded to exit the Safeway without paying, at which point Rayback and Buel approached her. Id. B.O.J. was confrontational at first but then followed Rayback and Buel back into the store to sign a trespass order. Id. Prior to signing the order, B.O.J. again became confrontational, knocked over a display case, and fled. Id. Rayback and Buel informed Renton Police who were able to locate and arrest B.O.J. near the Safeway. Id. B.O.J. was still in possession of all eleven bottles of liquor. Id.

Prior to this incident, B.O.J. had numerous encounters with law enforcement and violations of court orders. Between April 2014 and December 2016, B.O.J. had 15 police referrals, of which 8 were dismissed without prejudice. Probation Report 2.<sup>4</sup> Her seven convictions were modified for noncompliance five times, each time

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<sup>4</sup> The Probation Report ("JPC's Dispositional Report to the Court") was adopted in full by the court in Finding of Facts 4 and 5.

leading to time in detention. Id. at 3. During this time, B.O.J. also accumulated 31 criminal warrants and 20 warrants from the Department of Social and Health Services Children's Administration (DSHS). Id.

In July 2015, B.O.J. was recommended for residential drug and alcohol treatment due to a dependency diagnosis. Id. at 4. She refused to participate in treatment and left after two days. Id. She has a family history of abuse and was born exposed to crack cocaine. Id. B.O.J. continues to use drugs and alcohol but denies that her use is problematic. Id. Her behavior has led her grandmother, who raised B.O.J., to say she expects B.O.J. will eventually die on the streets. Id.

In addition to substance abuse, B.O.J. struggles with mental health issues. Id. at 1. She acknowledges a lack of control of her anger, breaking things "like lighters or windows." Id. She has been diagnosed with Conduct Disorder and PTSD. Id. An evaluator also documented behaviors consistent with Narcissistic Disorder and Borderline Personality Disorder. Id. B.O.J. has received no medication, counseling, or other form of treatment. Id. at 2.

On November 15, 2016, B.O.J. pled guilty to two counts of Theft in the Third Degree. CP 8-14. Disposition was set over one

day in order for the court to receive a recommendation from B.O.J.'s Juvenile Probation Counsel (JPC). RP 15.

On that same day disposition was initially scheduled, November 16, 2016, B.O.J. left her DSHS placement and did not return. Finding of Fact 13; CP 40. A Violation of Court Orders warrant was issued, which led to B.O.J.'s detention on November 30, 2016. Id.

At the new disposition hearing on December 13, 2016, the State recommended 27 to 36 weeks JRA. RP 20. The JPC recommended 52 weeks JRA. Probation Report 1. The defense recommended local sanctions. CP 22. The court imposed 42 to 52 weeks JRA. CP 18.

Findings of fact and conclusions of law were entered December 28, 2016. CP 39-42. The court noted B.O.J.'s juvenile offender score, accepted as accurate the JPC's description of aggravating factors given B.O.J.'s history and conditions, and explained that either B.O.J.'s history of noncompliance or need of treatment would independently provide a sufficient basis for an upward finding of manifest injustice. Id.

**C. ARGUMENT**

**1. THE TRIAL COURT'S PURSUIT OF THE JUVENILE JUSTICE ACT'S STATED GOALS OF TREATMENT AND ACCOUNTABILITY DO NOT PROVIDE A BASIS FOR RESENTENCING.**

The Juvenile Justice Act of 1977, codified as RCW 13.40, gives the court guidance in how to sentence juvenile offenders. Specifically, RCW 13.40.0357 establishes standard detention ranges based on the severity of the underlying conduct. When imposing the standard range would constitute a manifest injustice, as supported by clear and convincing evidence, the court may impose a sentence that deviates from the standard range. RCW 13.40.160(2).

Within the Juvenile Justice Act, secure detention is explicitly endorsed as one means towards the Act's ends. RCW 13.40.0357. Among those ends, the Act explicitly lists treatment and accountability. RCW 13.40.010.

In applying the various sanctions endorsed, the Act grants deference to the judiciary, allowing manifest injustices when warranted. RCW 13.40.160(2). This deference to deviate from recommended ranges was not limited to particular types of crimes; it was granted to all juvenile proceedings in recognition of the myriad factors that may be relevant in juvenile rehabilitation. Any argument

that secure detention undermines the Act's purposes asks the court to substitute its judgment in place of an explicit determination by the legislature. Because the legislature has endorsed detention as an option in pursuit of the trial court's stated purposes of rehabilitation and accountability, the trial court's disposition is proper.

**2. THE EVIDENCE CLEARLY AND CONVINCINGLY DEMONSTRATES THAT A MANIFEST INJUSTICE FINDING WAS NECESSARY TO PROPERLY MEET B.O.J.'S NEEDS.**

When a reviewing court examines a manifest injustice finding, it undertakes a three-part test: "(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 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). The finding is reviewed as a matter of law. Id. at 813 (citations omitted).

A manifest injustice finding must be supported "clearly and convincingly." RCW 13.40.230(2)(a). The court must find that the standard sanction range "would impose a serious, and clear danger to society in light of the purposes of this chapter."

RCW 13.40.020(17). Those purposes include protecting the community, ensuring accountability, seeking proper rehabilitation and reintegration, and “[p]rovid[ing] the necessary treatment, supervision, and custody.” RCW 13.40.010(a), (c), (f), (g).

In this case, the trial court’s manifest injustice finding was based on the independently sufficient grounds of accountability and treatment. Finding of Fact 22; CP 41. B.O.J.’s treatment needs include both substance abuse treatment and mental health counseling. Finding of Fact 5; CP 39.

B.O.J. does not dispute that she has a problem with drugs and alcohol. Finding of Fact 16; CP 41. While she would refuse to admit her addictions to her JPC, she never denied them in court and eventually admitted to needing help at disposition. Id. The court’s previous attempt at securing treatment for B.O.J. ended when she left treatment after two days of refusing to participate. Probation Report 4. It was this prior experience that led the court to conclude that detention was necessary to increase B.O.J.’s likelihood of success in treatment. Finding of Fact 17; CP 41. The court concluded that JRA substance abuse treatment typically requires at least 10 weeks, but often requires more when the participant is not fully engaged. Findings of Fact 18-19; CP 41.

B.O.J.'s mental health issues similarly remain untreated. Probation Report 2. She admits having anger issues that lead her to break things, "like lighters or windows." Id. at 1. She was previously diagnosed with Conduct Disorder and Chronic PTSD. Id. Most recently, the King County Assessment Team concluded that B.O.J. exhibits behaviors consistent with Narcissistic Disorder and Borderline Personality Disorder. Id. Her evaluator recommended treatment at JRA, "to keep her alive." Probation Report 4.

Independent of her treatment needs, the trial court found B.O.J.'s criminal history and extensive noncompliance with court orders warranted a manifest injustice finding. Finding of Fact 21; CP 41. Between April 2014 and December 2016, B.O.J. had 15 police referrals, of which 7 led to convictions and 8 were dismissed without prejudice. Probation Report 2. Among her convictions, the court modified her conditions of disposition five times due to noncompliance, each time imposing detention. Id. at 3. During this time, B.O.J. also accumulated 31 criminal warrants, 19 of which were for violations of court orders, and 20 warrants from the Department of Social and Health Services Children's Administration (DSHS). Id.

Based both, but independently, on B.O.J.'s treatment needs and need to be held accountable, the trial court concluded that manifest injustice findings were warranted beyond a reasonable doubt. Findings of Fact 20-22; CP 41. B.O.J.'s situation closely parallels that of State v. Taylor, in which the court's imposition of a manifest injustice finding was upheld based on the juvenile's history of delinquency, violation of conditions, prior leniency, lack of accountability, and substance abuse. 42 Wn. App. 74, 77, 709 P.2d 1207 (1985). The juvenile in that case, like B.O.J., was convicted of a property misdemeanor. Id. Similarly, the juvenile in State v. Rhodes was found to have properly received a manifest injustice finding based on four prior felonies and committing an offense the same day as meeting his parole officer. 92 Wn.2d 755, 761, 600 P.2d 1264 (1979). Here, B.O.J. ran from her DSHS placement the same day the court set over sentencing so that she could demonstrate her ability to succeed outside of JRA. Finding of Fact 13; CP 40. The record, including this noncompliance and an extensive account of B.O.J.'s prior actions and needs, thus demonstrates the need for a manifest injustice finding beyond a reasonable doubt.

**3. THE TRIAL COURT MAY PROPERLY CONSIDER ANY RELEVANT AND MATERIAL INFORMATION, INCLUDING UNCHARGED CRIMINAL CONDUCT, IN MAKING ITS MANIFEST INJUSTICE DETERMINATION.**

Uncharged and dismissed criminal conduct may be properly considered at disposition by the trial court. In State v. Strong, the appellate court stated, "In disposition hearings all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value, even though such evidence may not be admissible in a hearing on the information. 23 Wn. App. 298, 291-92, 599 P.2d 20 (1979) (citing RCW 13.40.150(1)). Specifically, the juvenile in Strong had asserted the police contacts not in his formal criminal history should be excluded from consideration. Id. The court held that police contacts may be properly considered by the court at disposition. Id.

Here, the trial court cited B.O.J.'s, "uncharged criminal conduct, dismissed charges, and failures to comply with court orders." Finding of Fact 21; CP 41. Unlike Strong, all of this conduct falls entirely within B.O.J.'s "formal" criminal history. Thus the trial court could have, had it determined the information material and relevant, considered even more of B.O.J.'s uncharged conduct than it actually did in making its decision.

Respondent further argues that the trial court improperly considered B.O.J.'s dependency and economic circumstances in its decision. The trial court's Findings of Fact and Conclusions of Law refer to neither of these as factors. The court does refer to the "lack of stability for the respondent in the community, and the respondent[']s inability] to comply with DSHS placements." Finding of Fact 14; CP 41. Probation also notes that the adults in B.O.J.'s life, her father and grandmother, have said, respectively, that "she should be incarcerated," and, "she will be dead on the street." Probation Report 11. The court finding instability to be a relevant factor is, therefore, consistent with proper consideration of lack of parental control and disobedience of authority as factors in a manifest injustice finding. See Taylor at 77; see also State v. Rice, 98 Wn.2d 384, 387, 655 P.2d 1145 (1982). Stability and behavior are properly considered as the court determines the prospects of success in the community as opposed to in detention.

**4. THE COURT'S SENTENCE WAS NOT AN ABUSE OF DISCRETION GIVEN B.O.J.'S NEED FOR TREATMENT AND ACCOUNTABILITY.**

If a court properly finds a manifest injustice, "it has broad discretion to determine the length" of the sentence. Duncan, at 815

(citations omitted). "A disposition will be reversed only if the sentence imposed is so clearly excessive as to constitute an abuse of discretion." State v. Melton, 63 Wn. App. 63, 70, 817 P.2d 413 (1991) (citations omitted). "A sentence is excessive only when it cannot be justified by any reasonable view which may be taken of the record." Strong at 295.

Given Respondent's criminal history, substance abuse, and mental health needs, the trial court determined that 42 to 52 weeks JRA was necessary to accomplish meaningful rehabilitation and treatment. Findings of Fact 20-22; CP 41. The court specifically found that treatment requires a minimum of 10 weeks but will require longer when, based on B.O.J.'s consistent conduct over more than two years, the juvenile is less than fully amenable to treatment. Findings of Fact 18-19; CP 41. The trial court's conclusion is consistent with the court in Taylor, which found that, "Community treatment has been tried for [juvenile]'s drug and alcohol problems. The court was entitled to conclude that further such efforts would probably not succeed . . . ." At 77. Likewise, here, the trial court considered what B.O.J. needed and how she had previously conducted herself, concluding that 42 to 52 weeks were required for proper accountability and treatment. Finding of Fact 20; CP 41.

**5. THE STATE DID NOT BREACH ITS DUTIES PURSUANT TO THE PLEA AGREEMENT BECAUSE B.O.J. WAS OFFERED AN OPPORTUNITY AND ACKNOWLEDGED VIOLATING THE TERMS OF THE PLEA BETWEEN PLEA AND DISPOSITION.**

When a respondent violates the conditions of release between plea and disposition, the State may make a sentencing recommendation that deviates from the plea agreement. The State must prove this deviation by a preponderance of the evidence. Matter of James, 96 Wn.2d 847, 850, 640 P.2d 18 (1982). The trial court must hold a hearing in which it makes a determination of noncompliance. Id. at 850-51.

In this case, the trial court made a determination of noncompliance and offered B.O.J. an opportunity to object to the evidence before the court. RP 24. On December 13, 2016, the State presented to the court that Respondent had left her approved housing on the same day she was last in front of the court. RP 20. B.O.J.'s counsel responded, "I know that one of the main concerns was that she stay in placement; that didn't happen." RP 22. Later in this hearing, the court asked B.O.J.'s counsel, "[F]actually, is there anything contained within [the JPC's] report that you contest?" RP 24. Counsel objected to the court's consideration of the JPC's report on hearsay and due process grounds, but otherwise did not deny the

factual allegations. RP 25. To this objection, the trial court concluded that it was relying on “the court records, which the Court can take judicial notice of and are not hearsay and would be admissible in any kind of hearing.” RP 28-29. The court went on to find that B.O.J., “has failed to comply with conditions of recent dispositional orders,” and, “that while on conditional release or under probationary supervision, [B.O.J.] continued to re-offend while matters were still pending before the courts.” RP 29. The court explicitly marked and admitted the JPC’s, “50 pages worth of information,” as the evidence upon which it relied in making a decision. RP 31.

The State’s disposition recommendation made the conditions of the plea agreement clear to B.O.J. In all capital, bold type, the agreement states, “The State’s recommendation may increase in severity based on any of the following: additional convictions/adjudications, the respondent commits new charged or uncharged crimes, fails to appear for any hearing, or violates conditions of release.” CP 15. B.O.J. does not deny having violated her conditions of release by running from placement. Finding of Fact 13; CP 40. Given this condition, the court properly considered evidence of noncompliance in an open hearing, provided B.O.J.

opportunity to respond or object, and permitted the State's deviation from the plea agreement based on a finding of noncompliance.

**D. CONCLUSION**

The record demonstrates that the trial court properly considered evidence that clearly and convincingly supported a finding of manifest injustice in order to apply the Juvenile Justice Act's stated goals of treatment and accountability to B.O.J.

DATED this \_\_\_\_\_ day of June, 2017. *Modified to insert initials*

Respectfully submitted, *October 16, 2018.*

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