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NO. 95542-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

B.O.J.,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Is a standard range disposition that depends on community-based treatment a manifest injustice when clear and convincing evidence shows the juvenile has severe substance use, mental health, and academic needs, and has a history of failed community-based treatment including 31 criminal warrants and 18 warrants for leaving residential placements?

2. Is a disposition of 42 to 52 weeks of Juvenile Rehabilitation Administration (JRA) custody reasonable given B.O.J.'s noncompliance with community-based intervention attempts and where 52-65 weeks was recommended for drug and alcohol, mental health, and academic services?

3. Was the court's consideration of noncompliance history, treatment needs, and failure to reside in approved DSHS residences appropriate when the Juvenile Justice Act encourages consideration of any factor deemed material to effectuating the diverse objectives of the Act?

4. Was the State permitted to deviate from its agreed recommendation when B.O.J. failed to comply with an express term of the agreement, admitted to her failure to comply, and did not dispute the allegations when expressly given the opportunity by the trial court?

5. Are the issues raised on appeal moot when the juvenile has served the imposed sanction, is now 19, and existing mechanisms allow appellate courts to review manifest injustice dispositions?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged B.O.J. with one count of Theft in the Third Degree and one count of Minor in Possession of Liquor on June 29, 2016. CP 1-2. 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. pleaded guilty to the amended charges on November 15, 2016. CP 8-14. The following day, the court decided to set over disposition in order to evaluate B.O.J.'s ability to comply with certain specific conditions, including residing in an approved placement. CP 40. B.O.J. was released from custody on November 16, 2016. CP 40. By November 17, 2016, she had fled her placement and a warrant was issued for violating court orders. RP 18; CP 40. After B.O.J. was arrested on the warrant, the court held a disposition hearing on December 13, 2016, at which the State recommended B.O.J. receive 27-36 weeks of secure detention. RP 20. B.O.J.'s Juvenile Probation Counselor (JPC) recommended 52 weeks secure detention. RP 28. B.O.J. recommended local sanctions. RP 25. The trial court imposed a disposition of 42-52 weeks of custody with the Juvenile Rehabilitation Administration (JRA). RP 35.

The Court of Appeals, Division One, affirmed the manifest injustice disposition. State v. B.O.J., No. 76258-3-I, ___ WL ___ (2018).

This court granted B.O.J.'s petition for review. Order, State v. B.O.J., No. 95542-5 (September 6, 2018).

2. SUBSTANTIVE FACTS

B.O.J. was arrested on April 30, 2016, after stealing 11 bottles of liquor from a Safeway store. CP 3-4. She was again arrested for shoplifting on September 14, 2016, while the initial charges were pending. CP 6. B.O.J. pleaded guilty to two counts of Theft in the Third Degree on November 15, 2016. CP 8-14.

For more than two years, B.O.J. had demonstrated extreme need.¹ B.O.J. had fallen significantly behind at school. RP 19; CP 39.² She had untreated drug and alcohol addictions severe enough to warrant inpatient treatment. RP 19, 25; CP 39.³ She struggled with mental health issues. RP 19; CP 39, 41.⁴ Her JPC and the court suspected she was involved with a gang or gang members. RP 29-30.⁵ And there was substantial concern about her safety in her current lifestyle. RP 27, 34.⁶

The juvenile justice system was unable to achieve B.O.J.'s rehabilitation in the community. Between May 2014 and December 2016,

¹ The State will cite to the Report of Proceedings in order to document bases relied upon by the trial court as specifically as possible. The Probation Report, which B.O.J. filed under seal with the Court of Appeals, provides greater detail on the severity of her needs.

² Probation Report 8.

³ Probation Report 9.

⁴ Probation Report 1.

⁵ Probation Report 3.

⁶ Probation Report 8, 9.

B.O.J. had 11 convictions, 31 criminal warrants, and at least 18 DSHS warrants for running from her residential placement. CP 40.⁷ Despite multiple attempts from providers, B.O.J. resisted community services for either drug and alcohol or mental health concerns. RP 20-21, 30-31.⁸

When B.O.J. was released pending disposition on this matter, she immediately ran, violating an explicit condition of the court. RP 18; CP 40. At disposition on December 13, 2016, the court imposed 42 to 52 weeks of custody with the JRA, finding two independently sufficient bases for a manifest injustice upward: (i) her need for treatment and demonstrated inability to receive it in the community, and (ii) that the standard range was too lenient based on her prior criminal conduct and noncompliance with court orders. CP 41.

C. ARGUMENT

1. THE MANIFEST INJUSTICE DISPOSITION IMPOSED BY THE COURT WAS APPROPRIATE GIVEN B.O.J.'S TREATMENT NEEDS AND HISTORY OF BEHAVIOR FOR WHICH SHE HAD NOT BEEN HELD ACCOUNTABLE.

The court may deviate from a standard range disposition when it finds that the standard range would impose a manifest injustice. RCW 13.40.160(2). A manifest injustice occurs when the standard sanction

⁷ Probation Report 3.

⁸ Probation Report 4, 7.

would be either “an excessive penalty on the juvenile or would impose a serious, and clear danger to society in light of the purposes of this chapter.” RCW 13.40.020(19). The purposes of the Juvenile Justice Act include community protection; accountability; punishment commensurate with culpability; rehabilitation; treatment under supervision; and restitution for victims. RCW 13.40.010(2).

Appellate courts will overturn a manifest injustice finding only upon a showing that the decision was not supported by clear and convincing evidence and that the disposition imposed was either clearly excessive or clearly too lenient. RCW 13.40.230(2). A trial court’s decision is reviewed for manifest abuse of discretion. State v. Sledge, 133 Wn.2d 828, 844, 947 P.2d 1199 (1997).

In the present case, the trial court found two independent bases for the manifest injustice. First, the standard range “would not allow sufficient time for the respondent to complete the services she needs, nor would she engage with such services in the community.” CP 41. Second, the standard range “would be too lenient in light of the respondent’s uncharged criminal conduct, dismissed charges, and failures to comply with court orders.” CP 41.

a. Clear And Convincing Evidence Establishes That B.O.J.'S Treatment Needs Would Only Be Met With A Disposition Greater Than The Standard Range.

The trial court relied on a detailed history demonstrating that B.O.J.'s rehabilitation, necessary for her own safety and that of the community, could only be accomplished with a commitment to JRA. B.O.J.'s needs were extensive: mental health counseling, alcohol and drug abuse treatment, remedial attention for academics, and services to assist in a transition to adulthood. RP 33-35.⁹ The State noted that the minimum term required for drug and alcohol treatment alone is 10 weeks, but that treatment often takes longer if the youth is resistant. RP 20. The State further noted that programs such as drug and alcohol treatment typically run consecutive, not concurrent, to services such as mental health counseling. RP 20. The JPC suggested that much longer than 10 weeks would be necessary to provide B.O.J.'s needed services.¹⁰

For the purposes of disposition, B.O.J.'s refusal to stay in her approved residential placements presented an even greater challenge than the severity of her needs. B.O.J. completed needs assessments, but never followed through with services. RP 30.¹¹ In two years, B.O.J. failed to

⁹ Probation Report 1, 8, 9.

¹⁰ Probation Report 11.

¹¹ Probation Report 2, 4.

appear for court 12 times, violated conditions of probation or release 19 times, and fled from her DSHS placement at least 18 times, resulting in a total of 49 warrants. CP 40. Simply put, B.O.J. had proven that it would be impossible to provide her with rehabilitative services in the community.

When treatment opportunities in the community have proven inadequate, a manifest injustice is appropriate even for minor crimes. In State v. Rice, the juvenile was charged with attempted criminal trespass, a simple misdemeanor. 98 Wn.2d 384, 386, 655 P.2d 1145 (1982), disagreed with on other grounds, State v. Coria, 120 Wn.2d 156, 170, 839 P.2d 890 (1992). Rice was a 16-year-old who had previously failed a diversion for Theft in the Third Degree and been convicted of Theft in the Third Degree, Possession of Stolen Property, and Burglary in the Second Degree. Id. The JPC reported that Rice stole from his mother, lied to her, smoked marijuana, did not attend school, and violated probation terms multiple times, but continued to live at home. Id. This Court concluded, on the basis of refusal to comply with supervision and continued offending, that a term of 52 weeks was appropriate even though the adult maximum for the same offense was only 90 days. Id. at 396-97.

Similarly, in State v. M.L., while the specific disposition imposed was deemed excessive, this Court upheld the finding of a manifest injustice upward based upon the vulnerability of the victim, threat posed to

the community, and inadequacy of the standard range to meet treatment needs. 134 Wn.2d 657, 660-61, 952 P.2d 187 (1998). The juvenile in that case was a 10-year-old convicted of Rape of a Child in the First Degree and Attempted Rape of a Child in the First Degree. Id. at 658. M.L. had a history of misbehavior at school and home, but had no criminal history and had been showing progress with his counseling in the community. Id. Still, his needs were deemed sufficiently severe that they clearly and convincingly supported a manifest injustice disposition. Id. at 661.

The Court of Appeals often relies on treatment needs and insufficient control in the community as bases for upward manifest injustice findings. See, e.g., State v. F.T., 426 P.3d 753 (2018) (upholding a 27-36 week manifest injustice on a first-time misdemeanor offender based upon youth's needs); State v. J.V., 132 Wn. App. 533, 540-42, 132 P.3d 1116 (2006) (need for treatment, exhaustion of community resources); State v. T.E.H., 91 Wn. App. 908, 917-18, 960 P.2d 441 (1998) (high risk to reoffend, vulnerable victim, lack of family control); State v. Bevins, 85 Wn. App. 281, 284, 932 P.2d 190 (1997) (high risk to reoffend, treatment needs, inability to receive needed treatment within standard range); State v. S.H., 75 Wn. App. 1, 11-12, 877 P.2d 205 (1994) (high risk to reoffend, treatment needs); State v. N.E., 70 Wn. App. 602, 606-07, 854 P.2d 672 (1993) (sexual trafficking victimization, addiction,

depression, flight from treatment, lack of parental control, criminal history); State v. Taylor, 42 Wn. App. 74, 77, 709 P.2d 1207 (1985) (history of delinquency, violation of release conditions, prior leniency, lack of accountability, substance abuse).

B.O.J.'s needs significantly exceed those exhibited in Rice and her amenability to treatment is far below that demonstrated in M.L. Like Rice, B.O.J. had fallen far behind in school and regularly violated the terms of supervision. CP 40.¹² Her drug and alcohol use, beyond the "some involvement" present in Rice, reached such a level that she qualified for inpatient treatment. RP 25. Her criminal history was more extensive. CP 40.¹³ B.O.J. also faced a more serious present offense than Rice: two gross misdemeanors rather than a single simple misdemeanor. And she suffered from mental health issues and specific threats to her safety in the community given her chosen lifestyle, neither of which were a factor in Rice. RP 34. While B.O.J.'s offense is less serious than that of M.L., her demonstrated needs are comparable or greater, and her amenability to treatment is significantly lesser. Like this Court found in Rice and M.L., therefore, there is clear and convincing evidence that the manifest injustice disposition was necessary.

¹² Probation Report 10.

¹³ Probation Report 2-3.

b. Clear And Convincing Evidence Establishes That The Standard Range Was Too Lenient Given B.O.J.'S History Of Offending And Noncompliance, Which Demonstrated Greater Than Usual Culpability, Need For Accountability, And Need For Strict Conditions Of Treatment And Supervision.

Independent of the manifest injustice based on treatment needs, the trial court found a manifest injustice was warranted based on B.O.J.'s uncharged or dismissed conduct and history of noncompliance. CP 41. Division One of the Court of Appeals has long held that trial courts may consider uncharged and unproven offending in disposition hearings, given the purposes of the Juvenile Justice Act (JJA). State v. Strong, 23 Wn. App. 789, 791-92, 599 P.2d 20 (1979). In State v. Rhodes, the court was particularly troubled by reoffending that showed a juvenile was flaunting the authority of the court. 92 Wn.2d 755, 761, 600 P.2d 1264 (1979), overruled on other grounds by State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003). The Court stated, "That fact *alone* clearly and convincingly supports the court's conclusion that to impose the standard range would effectuate a manifest injustice." Id. (emphasis added). Such conduct can be indicative of greater needs, including the needs for treatment, community safety, and accountability, all stated purposes of the JJA.

B.O.J.'s record goes well beyond the single concerning incident in Rhodes. In less than three years, B.O.J. had numerous criminal referrals

that did not lead to convictions and thus were not factored into her offender score. CP 40.¹⁴ She accumulated 19 warrants for violations of court orders and 12 warrants for failing to appear at court hearings, which again were not considered in her standard range. CP 40. Her reoffending, noncompliance, and absconding continued regardless of supervision or service offerings in the community. RP 29, 30; CP 40-41. This pattern of behavior demonstrated that even though B.O.J.'s present offenses were not felonies, local sanctions were plainly inadequate to provide the intended accountability, behavior corrections, or supervision.

2. THE DURATION OF THE DISPOSITION WAS APPROPRIATE GIVEN B.O.J.'S TREATMENT NEEDS AND HER DEMONSTRATED INABILITY TO SUCCEED WITH REHABILITATION IN THE COMMUNITY.

The juvenile court retains significant discretion in determining the length of a manifest injustice disposition. State v. Beaver, 148 Wn.2d 338, 345, 60 P.3d 586 (2002) (citations omitted); see also M.L., 134 Wn.2d at 660. The legislature prescribes only that the disposition must be determinate with appropriately limited ranges, RCW 13.40.160(2), and that it may not exceed the length of detention an adult may receive for the same offense, RCW 13.40.160(11). Appellate courts review the

¹⁴ Probation Report 10.

disposition imposed for manifest abuse of discretion. Sledge, 133 Wn.2d at 844. Specifically, appellate courts shall reverse the trial court's decision "only when it cannot be justified by any reasonable view which may be taken of the record." M.L., 134 Wn.2d at 660.

When it has been demonstrated that a juvenile has significant needs that may be addressed at JRA, the trial court retains significant discretion to tailor a disposition to meet those needs. This Court emphasized the principles underlying that authority in Rice, holding that the duration of a disposition should be tied to a child's needs rather than to the severity of the underlying offense:

It would be, in effect, telling the juvenile court to ignore the needs of the juvenile until he is convicted of committing an even more serious offense. Such an approach is necessary under the adult system in which punishment is the paramount purpose and where the punishment must fit the crime. But it is inimical to the rehabilitative purpose of the juvenile justice system. It would destroy the flexibility the legislature build into the system to allow the court, in appropriate cases, to fit the disposition to the offender, rather than to the offense.

98 Wn.2d at 397. In Rice, the Court found a summary of previous offenses, marijuana use, misbehavior at home, and truancy sufficiently compelling to uphold the trial court's imposition of 52 weeks of detention. Id. at 401. In Rhodes, the Court found the 52-week disposition supported despite an even more limited basis: one instance of reoffending soon after

meeting the juvenile's parole officer. 92 Wn.2d at 761. While in M.L., the Court held the eleven-year disposition was excessive, the Court so concluded because there was "no evidence" to support such a lengthy disposition for a 10-year-old. 134 Wn.2d at 661. The Court suggested that the trial court could have exceeded one year of detention and two years of community supervision, explaining that the trial court was not bound by that recommendation despite it having been made by all parties. Id. In making this clarification, this Court reaffirmed the principle that dispositions imposed by the trial court will be affirmed if they have any reasonable basis.

At the disposition hearing for B.O.J., her probation counselor recommended three distinct services: mental health treatment, drug and alcohol treatment, and academic intervention. RP 30.¹⁵ The State echoed the recommendations, noting that services typically run consecutively. RP 20.¹⁶ The JPC recommended a disposition of 52 weeks at JRA to allow sufficient time for services. RP 28. The court observed that the minimum time required for drug and alcohol services alone is 10 weeks, which is only possible if the juvenile is fully compliant. CP 41. The Court relied upon the JPC's report to determine how long would be needed to deliver

¹⁵ Probation Report 11.

¹⁶ Probation Report 11.

B.O.J.'s combination of services. RP 31.¹⁷ Given B.O.J.'s history of refusing to admit her addictions and refusing to participate in services, it is reasonable to expect that her progress would be incremental. Given B.O.J.'s needs and the purposes of the JJA, the court's imposed disposition of 42 to 52 weeks at JRA is appropriate.

3. THE FACTORS UPON WHICH THE COURT RELIED, B.O.J.'S TREATMENT NEEDS AND HISTORY OF UNSANCTIONED BEHAVIOR, ARE PROPER CONSIDERATIONS FOR A MANIFEST INJUSTICE DISPOSITION.

The trial court has wide discretion in what information to consider when deciding the proper terms of a juvenile disposition. “[A]ll 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” RCW 13.40.150(1). The only exceptions are that a respondent’s sex, race, religion, socioeconomic status, or dependent status may not be considered. RCW 13.40.150(4). The court also may not send a juvenile to detention “*solely* because of the lack of facilities, including treatment facilities, in the community.” RCW 13.40.150(5) (emphasis added). Aside from these narrow exceptions, the trial court has wide discretion in its attempts to realize the purposes of the Juvenile Justice

¹⁷ Probation Report 11.

Act. See 13.40.010(2). This was a policy decision made by the legislature to which B.O.J. has raised no constitutional challenges.

Neither of the two considerations challenged by B.O.J., dependent status and prior unsanctioned criminality, influenced the trial court's decision in this case. The court's Findings of Fact and Conclusions of Law do not reference B.O.J.'s dependent status except in noting that B.O.J. consistently ran from her DSHS placements. CP 40-41. This is not a critique of B.O.J.'s "status," it is simply a recognition that she persistently fails to abide by rules designed to ensure her well-being. This trial court's decision parallels that of the court in State v. F.T., where the court considered the juvenile's refusal to stay in any DSHS placement. 426 P.3d 753 (2018). Division Three held that the behavior of a dependent is highly probative in "fashion[ing] an appropriate rehabilitative disposition" and trial courts are not precluded from considering this evidence by the statutory prohibition on consideration of dependent status. Id. at 756.

Here, the trial court properly considered B.O.J.'s prior unsanctioned conduct as an indicator of her need for rehabilitation and accountability, both purposes of the Juvenile Justice Act. CP 40-42. The court referred to specific uncharged instances and noted that "it is undisputed that the respondent continued to reoffend while cases were

pending.” CP 40. This is not improper. Indeed, in Rhodes, this Court emphasized the juvenile’s reoffending within hours of meeting his parole officer in upholding his manifest injustice disposition. 92 Wn.2d at 761. As Rhodes and the present case both demonstrate, prior offenses and similar instances of noncompliance help the court determine what disposition is necessary to achieve the goals of accountability, community protection, and rehabilitation for the particular juvenile. Achieving these varied goals is a complicated endeavor, and success depends on the court’s ability to consider as much information as possible. This is precisely what the legislature intended with its broad mandate for courts to consider “all relevant and material evidence” in juvenile dispositions. RCW 13.40.150(1).

Further, even if the Court concludes that the trial court inappropriately considered prior offending and noncompliance, it should still uphold the manifest injustice disposition based upon the court’s findings regarding B.O.J.’s treatment needs. The trial court explicitly stated that, “Either of these bases,” referring to treatment needs and history of problematic behavior, “standing alone, would be sufficient for the Court to impose the MI Up in this case.” CP 41.

4. THE STATE DID NOT BREACH THE TERMS OF THE PLEA AGREEMENT BECAUSE IT WAS UNDISPUTED THAT B.O.J. HAD VIOLATED THE CONDITIONS OF HER RELEASE.

When a prosecutor and an accused reach a plea agreement, the prosecutor is bound by that agreement in making sentencing recommendations to the court as long as the accused has fulfilled the terms of the agreement. In re Pers. Restraint Petition of James, 96 Wn.2d 847, 850, 640 P.2d 18 (1982). If the prosecutor alleges a breach that is denied by the accused, the court must determine whether the prosecutor is bound by the terms of the plea agreement. Id. at 851. But see State v. Hall, 32 Wn. App. 108, 110, 645 P.2d 1143 (1982) (where defendant did not contest his own breach of the plea agreement, the absence of a hearing prior to State deviation from the agreed recommendation did not provide grounds for relief). The purpose behind this requirement is to ensure the accused is not “arbitrarily denied” the benefit of the agreement. Id. If the prosecutor breaches a plea agreement, the accused is generally entitled to specific performance or withdrawal of the plea. Id. at 851-52.

In the present case, B.O.J. admitted to having run from her residential placement, a condition of her release. The plea agreement stated, “The State’s recommendation may increase in severity based on . . . violat[ing] conditions of release.” CP 15. At the December 13 disposition

hearing, the State specified that it was changing its recommendation based upon B.O.J.'s violations, particularly running from her placement. RP 21. B.O.J.'s counsel conceded, "I know that one of the main concerns was that she stay in placement; that didn't happen." RP 22. To ensure that B.O.J. was given due process before being deprived of any promised rights or expectations, the trial court asked, "[F]actually, is there anything contained within [the JPC's] report that you contest?" RP 24. B.O.J. did not contest the allegation that she failed to reside in her approved placement, thereby violating her conditions of release. RP 25.

When a court has provided the accused with an opportunity to hear the allegations of breach and no defense is made, the accused's due process rights have been satisfied. In Hall, the State deviated from its plea agreement because the defendant had provided a false name throughout the pendency of his case, hiding a criminal record that would have influenced the prosecutor's recommendation. 32 Wn. App. at 110. Although the court did not explicitly find that the defendant had breached the agreement, it nonetheless held that the defendant was not entitled to enforce it because he never disputed the State's allegation. Id. Here, the trial court asked the basis for the State's deviation from the plea agreement, gave B.O.J. an opportunity to deny the allegations, and proceeded when B.O.J. did not contest the violation. RP 21, 24. Like in

Hall, there is no question that B.O.J. breached the terms of her agreement, so she is not entitled to relief.

5. THIS APPEAL IS MOOT AND THE ISSUES RAISED DO NOT IMPLICATE A MATTER OF CONTINUING INTEREST BECAUSE EXISTING LAW PROVIDES MECHANISMS TO REVIEW THE APPROPRIATENESS OF MANIFEST INJUSTICE DISPOSITIONS.

An issue is moot when the courts can no longer provide meaningful relief. Sorenson v. City of Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). Appeals requesting relief on moot issues should be dismissed unless they include “matters of continuing and substantial public interest” on which the law remains “unsettled.” Id.

The parties agree that the issues raised are moot as they apply to B.O.J. The maximum term of the imposed disposition expired in December 2017 and B.O.J. is now 19 years old.

The issues raised by B.O.J. do not present an unsettled legal question. B.O.J. challenges whether a trial court may impose a significant custodial disposition for misdemeanor property offenses. While this may raise policy considerations for the legislature, as a matter of law, B.O.J.’s disposition may be properly considered in the same way that appellate courts may review any manifest injustice disposition. The legislature granted significant authority to trial courts to impose manifest injustice

dispositions where appropriate based upon the diverse purposes of the Juvenile Justice Act. The legislature did not limit this discretion to certain offenses. See RCW 13.40.160(2). Furthermore, the legislature explicitly provides the means by which a party may appeal a manifest injustice disposition and the standards, processes, and remedies to be followed by the appellate courts. RCW 13.40.230; see also Rhodes, 92 Wn.2d at 760. B.O.J. makes no constitutional challenges to either this general statutory authority or to the exercise thereof in this particular case. The only issues of public importance, therefore, are policy issues to be decided by the legislature.

D. CONCLUSION

For the reasons set forth above, the State respectfully asks this Court to affirm the imposed manifest injustice disposition.

DATED this 2nd day of November, 2018.

Respectfully submitted,

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