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No. 96143-3

**THE SUPREME COURT
FOR THE STATE OF WASHINGTON**

STATE OF WASHINGTON, Respondent,

v.

D.L., Appellant.

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

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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INTRODUCTION

This appeal concerns the juvenile court's authority to enter a manifest injustice sentence. Under RCW 13.40.160(2), "if the court concludes, and enters reasons for its conclusion, that disposition within the standard range would effectuate a manifest injustice, the court shall impose a disposition outside the standard range." Here, Whatcom County Superior Court Commissioner Alfred Heydrich found manifest injustice for the following reasons:

- "[T]he victim in this case is particularly vulnerable." (VRP 246);
- There is a serious risk to reoffend both because of "a denial of criminal conduct" and "a low amenability to rehabilitation and treatment." (VRP 247-248);
- "[T]here has been a demonstration of lack of parental control." (VRP 248); and
- A disposition "outside the standard range was appropriate because...more time was necessary to...alter the defendant's behavior." (VRP 249).

Respondent D.L. appealed, and in an unpublished opinion, the Court of Appeals affirmed his sentence.

> When [D.L.] pleaded guilty, the parties believed that he would be participating in the [Special Sex Offender Dispositional Alternative] program. When [D.L.] was deemed ineligible for the SSODA program, the matter moved to sentencing. After reviewing [D.L.'s] failure to cooperate in the evaluation for the SSODA program, the probation department decided to

> recommend a manifest injustice sentence. [D.L.] was given notice of the recommendation adequate to prepare to respond at sentencing. We hold that [D.L.] was not denied his due process rights.

State v. D.L, No. 77360-7-I, slip op. at 6 (June 25, 2018).

D.L. now seeks discretionary review in this Court. Because the juvenile court had both authority and ample justification to enter a manifest injustice sentence, the State of Washington respectfully requests this Court to deny respondent's motion.

I. RESTATEMENT OF ISSUES PRESENTED

D.L.'s motion for discretionary review presents one issue:

A. Under RAP 13.4(b), this Court accepts review only if a case presents "a significant question of law under the Constitution" or "an issue of substantial public interest." Here, the Court of Appeals applied settled case law and an unambiguous statute to uphold the juvenile court's disposition. Has D.L. failed to justify further review of his case?

II. STATEMENT OF FACTS

A. D.L. Attempted To Molest His Five-Year-Old Half Brother.

When he pled guilty to one count of attempted child molestation in the first degree, Respondent D.L. adopted the probable cause statement as the relevant facts proving his guilt.

(5/24/17 Statement on Plea of Guilty ¶ 15; CP 111) ("court may review probable cause statement to establish a factual basis"). The following statement of facts comes from that probable cause affidavit. (8/9/16 Affidavit of Probable Cause; CP 4).

On August 9, 2016, Matthew Mulder reported to Whatcom County Sheriff Deputies that he had discovered D.L. in a locked bedroom with Mulder's five-year-old son. (8/9/16 Affidavit at 1; CP 4). Mr. Mulder said D.L. "had been slow to open the bedroom door when directed and was wearing only sports shorts; prior to entering the room, D.L. was fully clothed." (8/9/16 Affidavit at 1; CP 4). He noticed that his son was naked under a blanket on D.L.'s bed.

When a deputy questioned the five-year old, he disclosed that D.L. had "humped" him three separate times by penetrating his anus. (8/9/16 Affidavit at 1; CP 4). The State charged D.L. with three counts of rape of a child in the first degree, and one count of attempted rape of a child in the first degree. (Information; CP 1-2).

B. When The Superior Court Denied His Motion To Dismiss, D.L. Pled Guilty To One Count.

The State amended the information against D.L. twice, adding alternative charges for child molestation in the first degree. (First Amended Information; CP 47) (Second Amended Information; CP 51). In response, D.L. moved to dismiss all charges, alleging the amendments were made too close to trial. (Motion to Dismiss; CP 77). On May 22, 2017, the first day of trial, Superior Court Judge Raquel Montoya-Lewis heard argument and denied the motion to dismiss. (VRP 114) ("I'm certainly willing to give you a brief continuance").

The parties took a short break and returned with news that they were discussing settlement. (VRP 115) ("the State has made an offer to me that I feel I need to have some time to communicate to my client effectively"). The court postponed trial. Two days later, on May 24, 2017, D.L. returned to court to plead guilty.

At the plea hearing, Commissioner Heydrich questioned D.L. carefully to ensure he understood the consequences of pleading guilty. As part of the agreement, the State filed a third amended information charging Respondent with one count of

attempted child molestation in the first degree. The Commissioner began by making sure D.L. understood the charge.

> Q. Any questions about what the new charge means or what it is about?
>
> A. No.
>
> Q. All right. And do you feel like you've had enough time to fully discuss this situation with Ms. Jones?
>
> A. Yes.
>
> Q. Okay. I'm going to go over your offered Statement on Plea of Guilty. If you have any questions about this, I want you to ask me, or if you wish you can take a time out and talk privately with Ms. Jones, okay?
>
> A. Okay.
>
> Q. All right. So I know it's hard for you to sit still and concentrate.
>
> A. Yes, very.
>
> Q. But I need you to do your very best to listen to what I'm saying and actually hear it, okay?
>
> A. Okay.

(VRP 125). At the Hearing, the Commissioner went through each paragraph on D.L.'s Statement on Plea of Guilty. (VRP 122-137). (Statement on Plea of Guilty; CP 107).

Next, the Commissioner discussed D.L.'s rights and the consequences of waiving his ability to go to trial.

> But here's what you need to be clear on. If I accept this plea today and we continue this, and you go through the process, when you come back to be sentenced, you wouldn't be able to say, you know, "I wish I hadn't pled guilty I want to take it back; I want to have a trial now." It would be too late.

(VRP 128). D.L. said he understood. (VRP 128).

Finally, the Commissioner repeatedly warned Respondent that the court did not have to accept the parties' recommended sentence, a Special Sex Offender Disposition Alternative (SSODA).

> Q. We were just talking about a SSODA here, so that's a possible alternative sentence. But you need to understand that even if that is recommended to me, I don't have to follow that, and I have the discretion to send you to JRA if I think that's appropriate whether other people think it is or not; do you understand that?
>
> A. Yes.

(VRP 129); (VRP 129-130) ("only thing you could appeal would be a sentence outside the range"); (VRP 134) ("ultimately, though, I'm the one who has to decide whether you actually get" a SSODA).

Respondent's Statement on Plea of Guilty also warned him of the consequences to pleading guilty. (Statement on Plea of

Guilty; CP 107). In paragraph 8, the Statement describes the judge's authority to sentence outside the standard range.

> RIGHT TO APPEAL SENTENCE: I understand that the judge must impose a sentence within the standard range, unless the judge finds by clear and convincing evidence that the standard range sentence would amount to manifest injustice. If the judge goes outside the standard range, either the state or I can appeal that sentence. If the sentence is within the standard range, no one can appeal the sentence.

(Statement on Plea of Guilty ¶ 8; CP 108). Paragraph 9 warned Respondent that the maximum sentence could be commitment until he turns 21. (Statement on Plea of Guilty ¶9; CP 109).

Finally, the Statement repeated the Commissioner's warning that the court need not follow the recommended sentence.

> Although the judge will consider recommendations of the prosecuting attorney and the probation officer, the judge may impose any sentence he or she feels is appropriate, *up to the maximum allowed by law.*

(Statement on Plea of Guilty ¶ 14; CP 111) (emphasis added). As detailed in paragraph 8 above, the maximum allowed included a manifest injustice sentence beyond the standard range.

After an extended discussion with the Commissioner, and ample time to discuss the Statement with counsel, D.L. pled guilty to one count of attempted child molestation in the first degree. (VRP 137).

C. D.L. Failed To Qualify For A SSODA.

To receive a SSODA, D.L. had to complete a number of evaluations, beginning with a polygraph examination. It did not go well. D.L. missed the first appointment, and at the make-up exam, he denied any responsibility for sexual behavior. (8/30/17 Sealed SSODA Report at 9; CP 224). He also failed to cooperate with the Sex Offender Treatment Providers, showing an unwillingness to participate in the program. (Sealed SSODA Report at 1; Sub Num. 144; CP 224).

By the date of D.L.'s disposition hearing, no one recommended a SSODA. (VRP 243) ("nobody is urging the Court to impose a SSODA").

D. Probation Recommended A Manifest Injustice Sentence.

Under the plea agreement, both the Prosecutor and Respondent's counsel recommended a sentence within the standard range, 15 to 36 months. Whatcom County Probation was concerned this was too little time to guarantee D.L. adequate offender treatment. On August 1, 2017, Juvenile Probation Officer Linda Barry filed notice of intent to seek a manifest injustice sentence. (Notice; CP 158). This was four weeks before D.L.'s

August 30, 2017 disposition hearing, allowing Respondent's counsel time to file a memorandum in opposition. (Respondent's Disposition Memorandum; CP 194).

To support a longer sentence, Probation filed a sealed Manifest Injustice Report documenting the need for a sentence outside the standard range. (Sealed Manifest Injustice Report; CP 224). The office recommended an extraordinary disposition of 36-40 weeks. (Respondent's Disposition Memorandum at 2; CP 195). Two Probation counselors also testified at D.L.'s disposition hearing.

The first, Linda Barry, described why additional time was necessary.

> A longer sentence would allow the possibility for D.L. to go to a group home, and in a group home to finish his sentence he would have access to a certified sexual deviancy counselor. If he were to get the minimum sentence on the 15 to 36 range he would, with ten days credit, be out at the end of November; 36-week sentence would have him out mid/early May, early to mid-May; and a 40-week sentence would have him out early June. Probation just feels that to maximize the time at JRA where he's getting 24/7 coaching on behavioral and life skills, and then the possibility of transitioning to a group home through JRA to finish his sentence would allow him that time to work with a deviancy, a licensed deviancy counselor.

(VRP 216-17).

The second, Kelly Dahl, had direct experience with the programs at Echo Glen Children's Center, the JRA facility that would hold D.L. (VRP 220). An extended sentence would give Echo Glen the time to assess D.L.'s risk level, provide counseling, and then transfer him to an appropriate group home.

> [W]e simply aren't going to have the ability to support, monitor skills and generalized skills in the community outside of the possibility of him going to a group home, which again the WAC requires that a youth serve ten percent of their aggregate minimum sentence or 30 days, whichever is greater, so that chews away an additional four weeks of that sentence before he'd be eligible. Throw in the risk level process, which can take 30 days to 90 days to complete; it just starts really chewing up time to focus in on some specific things that I think the longer D.L. is exposed to those things the better off he is. The more coaching he's going to have, the more structure he's going to have.

(VRP 229).

E. <u>The Commissioner Entered a Manifest Injustice Disposition of 36 to 40 Weeks</u>

After reviewing the parties' submissions, weighing testimony, and considering counsels' arguments, the Commission found clear and convincing evidence that a sentence with the standard range would be a manifest injustice. (VRP 242-250). First, D.L.'s victim was particularly vulnerable.

> I believe that the information contained in the reports establishes that not only was the victim, in this case, five years old, but that this child was cognitively delayed...[W]hen you have a victim here who is in the same house, who is related to the defendant, and where there is easy access, and also where this five-year-old has cognitive delays, I think that gets us to particularly vulnerable.

(VRP 247).

Second, D.L. showed a serious risk of reoffending without specialized treatment for two reasons.

> [O]ne would be denial of criminal conduct, which I think has been demonstrated here. And a low amenability to rehabilitation and treatment, which I think has also been demonstrated here.

(VRP 247).

Third, D.L.'s parents and grandparents had little control over his behavior.

> [H]is own parents have...they've basically surrendered their responsibilities here. I'm aware the grandparents have stepped in, and I think they've done the best they can. But...I've got some serious questions about the grandparents' ability to control D.L.'s behavior...And I think that's clearly established here when one reviews the record here in terms of the number of reviews we've had to have and the problems that arose while this matter was under pretrial supervision.

(VRP 248).

Fourth, an extended sentence was necessary to provide D.L. the treatment and counseling he needs. Citing State v. T.E.H., 91 Wn. App. 908, 960 P.2d 441 (1998), the Commissioner found compelling that "the Court made a finding of serious risk to re-offend in that case and basically felt that an MI outside the range was appropriate because the record established that there was – more time was necessary to, in the Court's words, 'alter the defendant's behavior.'" (VRP 249).

The Commissioner found clear and convincing evidence of manifest injustice, imposing a sentence of 36 to 40 weeks. (VRP 250) (Disposition Order; CP 208). Respondent appealed, and on June 25, 2018, Division I of the Court of Appeals affirmed D.L.'s disposition. Respondent now seeks discretionary review in this Court.

ARGUMENT

III. STANDARD OF REVIEW

This Court reviews the manifest injustice sentence for the factors in RCW 13.40.230.

> To uphold a finding of a manifest injustice: (1) substantial evidence in the record must support the trial court's reasons; (2) those reasons must clearly and convincingly support the manifest injustice disposition; and (3) the disposition cannot be too

> excessive or too lenient. RCW 13.40.230(2). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth.

State v. Meade, 129 Wn. App. 918, 921–22, 120 P.3d 975 (2005).

The Court reviews Respondent's constitutional challenges *de novo.* State v. Bradshaw, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004) ("reviews statutory construction issues and constitutional issues de novo").

IV. THE COURT OF APPEALS' DECISION DOES NOT REQUIRE FURTHER REVIEW.

A. The Commissioner Had Compelling Evidence of D.L.'s Need for Intervention and Treatment

In the statement of facts above, the State quotes the testimony and reports that convinced Commissioner Heydrich that a manifest injustice sentence was necessary. This included:

- The testimony of Probation Counselor Linda Barry (VRP 214);
- The testimony of Probation Counselor Kelly Dahl (VRP 219);
- The Sealed 8/30/17 Manifest Injustice Report (CP 224); and
- The Sealed 8/30/17 Special Sex Offender Disposition Alternative Report (CP 224).

Viewed as a whole, this evidence shows a young man with serious sexual behavior problems and a dysfunctional family environment that provides no boundaries or accountability. Only significant time and work at Echo Glen followed by placement in a therapeutic group home gives D.L. a chance at rehabilitation.

Without a longer commitment, D.L. will return to the family that denies anything happened and has enabled his increasingly dangerous actions. He failed to qualify for a SSODA, and without help, he will continue to pose a danger to children around him. State v. Tai N., 127 Wn. App. 733, 744, 113 P.3d 19 (2005) ("need to hold juveniles responsible for their offenses, but also the continuing rehabilitative goals of the juvenile justice system and the policy of responding to the individual needs of offenders").

Substantial evidence proves Respondent's serious risk of reoffending, his abuse of a particularly vulnerable victim, and his need for therapeutic help and counseling.

B. Respondent Had Notice Of And The Opportunity To Contest A Manifest Injustice Sentence.

Respondent had 30 days' notice of the Probation Office's intent to seek an extraordinary sentence, and his counsel filed a

comprehensive memorandum in opposition. This is more than what due process requires.

> Due process requires that a defendant at a sentencing hearing be provided the opportunity to refute the evidence presented and that the evidence be reliable. However, due process does not require that an adult defendant receive notice that the court is considering imposing an exceptional sentence. No such notice is required because an exceptional sentence is a possibility in all sentencings. The courts reason that the defendant receives notice of the possibility of an exceptional sentence during the plea colloquy.

State v. Moro, 117 Wn. App. 913, 920, 73 P.3d 1029 (2003).

In Moro, the Court of Appeals applied this rule to juvenile proceedings.

> There was no specific notice that a manifest injustice disposition was being considered by the court, but Mr. Moro was advised during the plea colloquy that "the court doesn't have to follow anybody's recommendations on the sentence." Report of Proceedings at 7. Just as in proceedings under the SRA, a manifest injustice disposition is a possibility in all juvenile sentencings. RCW 13.40.160(1). The statute does not require express notice to a defendant that the court is considering imposing a manifest injustice sentence. Mr. Moro received notice that the court might not follow the sentence recommendations. That was adequate notice for due process purposes.

Moro, 117 Wn. App. at 923; State v. J.V., 132 Wn. App. 533, 540, 132 P.3d 1116 (2006) ("statutes clearly provide notice that a

manifest injustice disposition is a possibility in all juvenile sentences").

Here, Respondent acknowledged on the record: (1) that a SSODA was not a given (VRP 129); that the plea agreement was not binding on the court (VRP 134); and that the court could enter a manifest injustice sentence. (VRP 129-30) (Statement on Plea of Guilty ¶ 8; CP 108).

Despite this, Respondent argues that due process entitles him to a specific warning before he entered his plea. (Petition for Review at 12) ("notice of the aggravating factors prior to entry of the plea"). This is incorrect for a number of reasons.

First, as Moro observed, a manifest injustice sentence is a possibility in all juvenile sentences. Due process requires notice of that possibility, not the specific evidence the court may rely on to impose an extraordinary sentence. And unlike the Sentencing Reform Act for adults, the Juvenile Justice Act does not require notice of aggravating factors before an offender enters a plea. Compare RCW 9.94A.537(1) (SRA) with RCW 13.40.160(1) (JJA).

Second, Washington courts have repeatedly found juvenile sentencing substantially different from that for adults. The due process rights to juries for adults in Blakely v. Washington, 542

U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d. 435 (2000), do not apply to juveniles.

> Without a right of jury trial in juvenile cases, it is conceptually awkward to try to extract the due process component from Apprendi and Blakely and graft it onto non-jury juvenile dispositions. And it is unnecessary to do so because, as the State recognizes, the juvenile code already provides that a disposition harsher than the standard range must be supported by proof beyond a reasonable doubt.

State v. Tai N., 127 Wn. App. 733, 741, 113 P.3d 19 (2005). Because a juvenile court must find proof of aggravating factors beyond a reasonable doubt, Respondent's constitutional rights at sentencing are secure. Tai N., 127 Wn. App. at 742 ("as the Juvenile Justice Act already provides this guarantee, we decline to decide whether Apprendi and Blakely require the same standard as a matter of constitutional due process").

Third, requiring prior notice of aggravating factors in juvenile cases is unworkable and inconsistent with treatment and rehabilitation. Here, the parties expected D.L. to qualify for a SSODA. That outcome would have provided him the evaluation, treatment, and supervision necessary to address his sexual behavior. But his refusal to cooperate coupled with his family's

denial thwarted the recommended outcome. All of this became vital information on how to provide D.L. meaningful services and treatment. And it arose after D.L.'s plea.

If juvenile courts lose the ability to use this information, along with the authority to enter manifest injustice sentences, juvenile offenders will suffer the consequences. D.L. would most likely serve a short commitment in Echo Glen, without time to be evaluated and start counseling, and be released to his family. No group home, no counseling, no treatment.

> 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 built into the system to allow the court, in appropriate cases, to fit the disposition to the offender, rather than to the offense.

State v. Rice, 98 Wn.2d 384, 397, 655 P.2d 1145 (1982).

C. The Probation Department Did Not Violate The Separation Of Powers By Recommending A Manifest Injustice Sentence.

Respondent next contends that as a member of the judicial branch, the Probation Department could not allege and prove aggravating factors supporting a manifest injustice sentence.

(Petition for Review at 16). He argues that only the prosecutor – a member of the executive branch -- can do this.

The flaw in this argument is that it equates charging a crime with imposing the appropriate sentence. Respondent is correct that probation counselors cannot charge offenders with crimes. But acting for the sentencing judge, counselors may independently recommend a manifest injustice sentence and provide evidence in support.

> Probation counselors are agents of the juvenile court, not the prosecution. Counselors may recommend exceptional sentences even when their recommendations conflict with those of the prosecution. Merz concedes that the juvenile court was not bound by the plea agreement. If the court was not bound, neither was the probation counselor.

State v. Merz, 54 Wn. App. 23, 26–27, 771 P.2d 1178 (1989).

Under RCW 13.04.040, probation counselors have authority to "prepare predisposition studies as required in RCW 13.34.120 and 13.40.130, as now or hereafter amended, and be present at the disposition hearing to respond to questions regarding the predisposition study." This includes the power to recommend an exceptional sentence.

> Probation counselors have a statutory duty to make studies and recommendations to the court respecting dispositions. This function is a valuable aid to the

> court...This case is a good illustration of why probation counselors' sentence recommendations should be made independently of the prosecuting attorney.

State v. Poupart, 54 Wn. App. 440, 447, 773 P.2d 893 (1989).

Respondent argues that "filing of special available special allegations is the role of the prosecutor alone", but to recommend a manifest injustice sentence, a probation counselor must have compelling evidence in support. (Petition for Review at 20). The authority to recommend an exceptional sentence necessarily includes the ability to provide supporting evidence of the relevant aggravating factors. Because this is all part of sentencing – a judicial function – the separation of powers is respected.

CONCLUSION

Juvenile courts must simultaneously hold offenders accountable and provide them an opportunity to change. They "tread an equatorial line somewhere midway between the poles of rehabilitation and retribution." State v. Rice, 98 Wn.2d 384, 393, 655 P.2d 1145 (1982). The Commissioner in this case struck the appropriate balance by entering a manifest injustice sentence to give Respondent D.L. a fighting chance at rehabilitation.

The State of Washington respectfully requests the Court to deny Respondent's motion for discretionary review.

DATED this 22nd day of August, 2018.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I mailed or caused delivery of **Answer to Motion for Discretionary Review** to:

Washington Appellate Project
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1511 Third Ave., Ste. 701
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DATED this 22ND day of August, 2018.

_____
Heidi Main

BURI FUNSTON MUMFORD, PLLC

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