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Supreme Court No. 96434-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

T.J.S.-M.,

Appellant/Petitioner.

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ON REVIEW FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR SPOKANE COUNTY

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SUPPLEMENTAL BRIEF OF APPELLANT/PETITIONER – T.J.S.-M.

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Sean M. Downs  
Attorney for Appellant/Petitioner

GRECCO DOWNS, PLLC  
500 W 8th Street, Suite 55  
Vancouver, WA 98660  
(360) 707-7040  
sean@greccodowns.com

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## A. INTRODUCTION

The Spokane County Superior Court found T.J.S.-M. guilty of two counts of unlawful imprisonment with sexual motivation and one count of assault in the fourth degree with sexual motivation. The standard range disposition for each of these offenses was local sanctions, which consists of 0-30 days of confinement with up to 12 months of community supervision. T.J.S.-M. already had 83 days of confinement credit at the time of disposition.

After evaluation by a certified sex offender treatment provider, T.J.S.-M. was determined to be a low risk to reoffend. The court found both mitigating and aggravating factors in this case. Instead of imposing a standard range disposition, the court instead decided to find a manifest injustice and impose 36 weeks, suspended upon completion of the Special Sex Offender Disposition Alternative (SSODA) program. The court expressed that the standard to find aggravating circumstances was “just below” the beyond a reasonable doubt standard.

T.J.S.-M. appealed the manifest injustice sentence and while the appeal was pending he was sanctioned for a violation and ordered to serve five days of confinement as twenty hours of community service.

The Court of Appeals ultimately found that an appellate challenge to a suspended Juvenile Rehabilitation Authority (JRA) disposition was

not ripe because the SSODA disposition had not been revoked, relying on *State v. J.B.*, 102 Wn. App. 583, 9 P.3d 890 (2000).

**B. ISSUES PRESENTED**

1. A manifest injustice disposition is ripe for review before SSODA is revoked.
2. The imposition of a manifest injustice disposition was improper.
  - i. The court applied an incorrect standard of proof to find a manifest injustice.
  - ii. The court was not statutorily authorized to impose a manifest injustice disposition and then suspend that time on SSODA.

**C. STATEMENT OF THE CASE**

A summary of facts is already contained in the petitioner's petition for review and in the appellate record below and therefore will not be repeated here for brevity's sake.

**D. ARGUMENT**

**1. The imposition of a manifest injustice disposition is ripe for review before SSODA is revoked.**

The disposition of a juvenile offender is appealable in the same manner as criminal cases. *State v. J.W.*, 84 Wn. App. 808, 811, 929 P.2d 1197 (1997) (citing RCW 13.04.033). A criminal defendant is permitted to appeal an exceptional disposition generally or he may appeal a standard range disposition if the sentencing court failed to follow a procedure

required by the Sentencing Reform Act. *J.W.*, 84 Wn. App. at 811 (citing *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)); *see also* RCW 13.40.160(2) (“A disposition outside the standard range is appealable under RCW 13.40.230 by the state or the respondent.”).

Unlawful imprisonment is a C+ offense and fourth degree assault is a D+ offense. RCW 13.40.0357. Accordingly, without any prior criminal history, T.J.S.-M. was facing local sanctions of 0-30 days for each offense per the standard range under option A of RCW 13.40.0357. *Id.*; RCW 13.40.020(18). The maximum sentence that he could have received for a standard range sentence was therefore 90 days of confinement and two years of community supervision.<sup>1</sup> RCW 13.40.180(1)(b)-(c) (consecutive terms for separate offenses; two years maximum term for community supervision). T.J.S.-M. had 83 days of confinement credit at that point, so the court would only be able to suspend seven days on two years of community supervision at a maximum. RCW 13.40.0357 (local sanctions for instant offense); RCW 13.40.160 (credit for time served required for time spent in detention prior to disposition).

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<sup>1</sup> Previous briefing erroneously indicated that the local sanctions maximum for T.J.S.-M. was 30 days of confinement.

After being sanctioned for five days for a violation of SSODA, T.J.S.-M. would have had only two days suspended for a standard range sentence remaining. RCW 13.40.162(8)(a) (the court may impose a penalty up to thirty days confinement for violating conditions of the disposition). Instead, T.J.S.-M. was subject to continuing sanctions short of SSODA revocation of up to 36 weeks minus 83 days credit and minus five days of sanction time, thereby leaving 164 days suspended. This is 162 days of additional sanction time that could be imposed but for the finding of manifest injustice.

Under *J.B.*'s logic, an individual is subject to SSODA conditions and sanctions throughout the period of probation and cannot appeal the underlying manifest injustice sentence unless it is revoked. Therefore, an individual may be sanctioned up to thirty days per violation of SSODA without a remedy regarding the manifest injustice disposition. A respondent may indeed spend more time than that respondent would otherwise serve under a standard range sentence, and that respondent is left without an appeal remedy. In the instant case, that means T.S.J.-M. was subject to up to 162 days of sanctions without an appeal remedy, according to *J.B.*.

The SSODA statute indicates that a SSODA disposition is not appealable under the accelerated review provisions of RCW 13.40.230.

RCW 13.40.162(10). This simply means that accelerated review is not authorized; not that appellate review is not authorized altogether.

Regardless, T.J.S.-M. appealed his manifest injustice disposition, not the imposition of SSODA.

Given the foregoing, an improper manifest injustice disposition with SSODA imposed is ripe for review.

**2. The imposition of a manifest injustice disposition was improper.**

Under the Juvenile Justice Act (“JJA”), any offense is subject to a disposition above the standard range “[i]f the court concludes, and enters reasons for its conclusion, that disposition within the standard range would effectuate a manifest injustice” such that the standard disposition would impose a serious and clear danger to society. *State v. J.V.*, 132 Wn. App. 533, 539–40, 132 P.3d 1116 (2006); RCW 13.40.160(2). Mitigating and aggravating factors are listed under RCW 13.40.150. However, a juvenile court may rely on factors not listed in the JJA. *State v. Crabtree*, 116 Wn. App. 536, 544, 66 P.3d 695 (2003).

A finding of manifest injustice will be upheld if substantial evidence supports the reasons given, those reasons clearly and convincingly support the disposition, and the disposition is not too excessive or too lenient. *J.V.*, 132 Wn. App. at 540–41; RCW

13.40.230(2). The clear and convincing standard under the JJA is equivalent to the beyond a reasonable doubt standard. *State v. Rhodes*, 92 Wn.2d 755, 760, 600 P.2d 1264 (1979).

The disposition court must consider whether mitigating and/or aggravating factors exist, and may consider both statutory and non-statutory factors. *State v. S.H.*, 75 Wn. App. 1, 11–12, 877 P.2d 205 (1994); RCW 13.40.150(3). At the disposition hearing “all relevant and material evidence ... may be received by the court.” RCW 13.40.150(1).

**i. The court applied an incorrect standard of proof to find a manifest injustice.**

The “clear and convincing” standard is the civil counterpart to “beyond a reasonable doubt”. *In re Levias*, 83 Wn.2d 253, 517 P.2d 588 (1973); *State v. McCarter*, 91 Wn.2d 249, 588 P.2d 745 (1978). Our Supreme Court has held that the phrase “manifest injustice” represents a demanding standard. *State v. Taylor*, 83 Wn.2d 594, 521 P.2d 699 (1974). Thus, in order for a manifest injustice disposition to stand on review, the standard range for the offense(s) and that particular defendant must present, beyond a reasonable doubt, a clear danger to society. *Rhodes*, 92 Wn.2d at 760 (1979) (overruled on other grounds by *State v. Baldwin*, 150 Wn.2d 448, 78 P.3d 1005 (2003)). This beyond a reasonable doubt standard is well settled in case law:

- *State v. Murphy*, 35 Wn. App. 658, 669, 669 P.2d 891 (1983)  
 (“[A]ny manifest injustice finding must be supported by proof beyond a reasonable doubt that the defendant and the standard range for the offense presents a clear danger to society.”);
- *State v. Gutierrez*, 37 Wn. App. 910, 914, 684 P.2d 87 (1984)  
 (“This [clear and convincing] standard is comparable to the “beyond a reasonable doubt” standard.”);
- *State v. P*, 37 Wn. App. 773, 778, 686 P.2d 488 (1984) (“The ‘clear and convincing’ standard is the same as the criminal ‘beyond a reasonable doubt’ standard.”);
- *State v. J.N.*, 64 Wn. App. 112, 114, 823 P.2d 1128 (1992)  
 (“To withstand review, ‘the standard range for this offense and this defendant must present, beyond a reasonable doubt, a clear danger to society.’”);
- *State v. P.B.T.*, 67 Wn. App. 292, 301, 834 P.2d 1051 (1992)  
 (“[T]he reason given by a court must support a determination of manifest injustice beyond a reasonable doubt...”);
- *State v. J.S.*, 70 Wn. App. 659, 665, 855 P.2d 280 (1993)  
 (“[T]he reasons given by a judge must support a manifest injustice disposition beyond a reasonable doubt...”);

- *State v. N.E.*, 70 Wn. App. 602, 606, 854 P.2d 672 (1993) (“In order to withstand appellate review, the standard range and the juvenile before the court must present, beyond a reasonable doubt, a clear danger to society.”);
- *State v. T.E.C.*, 122 Wn. App. 9, 18, 92 P.3d 263 (2004) (“To withstand review, ‘the standard range for this offense and this defendant must present, beyond a reasonable doubt, a clear danger to society.’”);
- *State v. Meade*, 129 Wn. App. 918, 922, 120 P.3d 975 (2005) (“[T]he record must support, beyond a reasonable doubt, the reasons given for finding a manifest injustice.”);
- *State v. N.B.*, 127 Wn. App. 776, 779, 112 P.3d 579 (2005) (“‘clear and convincing evidence,’” [is] a standard that is equivalent to beyond a reasonable doubt”);
- *State v. Tai N.*, 127 Wn. App. 733, 741, 113 P.3d 19 (2005) (“The ‘clear and convincing’ standard as applied to a manifest injustice disposition is a demanding standard that has long been equated with ‘beyond a reasonable doubt’.”);
- *State v. J.V.*, 132 Wn. App. 533, 541 n.9, 132 P.3d 1116, 1120 (2006) (“The clear and convincing standard is comparable to the beyond a reasonable doubt standard.”).

In the instant case, the trial court mistakenly believed that the “clear and convincing” standard for purposes of the JJA was “just below” the beyond a reasonable doubt standard. RP 353. This is an incorrect understanding, even though the parties briefed the court on the correct standard in their sentencing memoranda. Therefore, since the court only found that the aggravators were proven by the lower standard of proof, the court did not actually find that the aggravators were proven beyond a reasonable doubt. This is a legal error and not a factual error.<sup>2</sup> *See, e.g., Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007) (reversal is permitted where an incorrect legal standard is applied); *State v. Coley*, 180 Wn.2d 543, 559, 326 P.3d 702 (2014) (a trial court abuses its discretion when it applies an incorrect legal standard). Accordingly, the aggravators should be stricken and the exceptional disposition must be reversed.

**ii. The court was not statutorily authorized to impose a manifest injustice disposition and then suspend that time on SSODA.**

RCW 13.40.0357 requires a disposition under either Option A (standard range sentence), Option B (suspended disposition alternative), Option C (chemical dependency / mental health disposition alternative), or

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<sup>2</sup> Previous briefing already detailed how there was not substantial evidence to support the manifest injustice disposition and will not be repeated here for brevity’s sake.

Option D (manifest injustice disposition). RCW 13.40.0357. Option B is only available “[i]f the offender is subject to a standard range disposition involving confinement by the department...” RCW 13.40.0357(B)(1). The “department” means the department of social and health services, which refers to a JRA disposition. RCW 13.40.020(9). An offender is not eligible for a suspended disposition under Option B if the offender is convicted of a sex offense. RCW 13.40.0357(B)(3)(d).

The court is not allowed to suspend or defer the imposition or the execution of the disposition except as provided under RCW 13.40.160 subsection (3), (4), (5), or (6), or option B of RCW 13.40.0357, or RCW 13.40.127. RCW 13.40.160(10). Subsection (3) of that statute allows a court to impose SSODA on a sex offense. RCW 13.40.160(3). “A disposition outside the standard range [as indicated in Option D] shall be determinate and shall be comprised of confinement or community supervision, or a combination thereof.” RCW 13.40.160(2). A suspended disposition is necessarily indeterminate as there is no fixed time of confinement. Read in conjunction, the court is therefore not allowed to impose a manifest injustice sentence (Option D) and suspend it on SSODA.

“[A] finding of manifest injustice (Option D) does not provide a juvenile court with the discretion necessary to suspend a sentence...”

*State v. Bacon*, 190 Wn.2d 458, 467, 415 P.3d 207 (2018). “[T]he [Juvenile Justice Act] clearly limits the juvenile court’s authority to impose suspended manifest injustice dispositions to the specific situations listed in RCW 13.40.160(10).” *Bacon*, 190 Wn.2d at 468.

The court in the instant case was therefore only allowed to either impose a determinate manifest injustice disposition under Option D or impose a standard range sentence under Option A with the possible imposition of SSODA. As such, the lower court erred in imposing SSODA in the instant case.

E. CONCLUSION

Given the foregoing, T.J.S.-M. respectfully requests this court to reverse the dismissal of the appeal.

DATED this 15th day of February, 2019.

Respectfully submitted,

s/ Sean M. Downs  
Sean M. Downs, WSBA #39856  
Attorney for Appellant  
GRECCO DOWNS, PLLC  
500 W 8th Street, Suite 55  
Vancouver, WA 98660  
(360) 707-7040  
sean@greccodowns.com

CERTIFICATE OF SERVICE

I, Sean M. Downs, a person over 18 years of age, served the Spokane County Prosecuting Attorney a true and correct copy of the document to which this certification is affixed, on February 15, 2019 to email address [scpaappeals@spokanecounty.org](mailto:scpaappeals@spokanecounty.org). Service was made by email pursuant to the Respondent's consent. I also served Appellant/Petitioner, T.J.S.-M., a true and correct copy of the document to which this certification is affixed on February 15, 2019 via first class mail postage prepaid to Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

s/ Sean M. Downs  
Sean M. Downs, WSBA #39856  
Attorney for Appellant  
GRECCO DOWNS, PLLC  
500 W 8th Street, Suite 55  
Vancouver, WA 98660  
(360) 707-7040  
[sean@greccodowns.com](mailto:sean@greccodowns.com)

**GRECCO DOWNS, PLLC**

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