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No. 96894-2

NO. 78442-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

M.S.,

Appellant.

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

APPELLANT'S MOTION FOR ACCELERATED REVIEW &
OPENING BRIEF

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A. INTRODUCTION

M.S. was 16 years old, largely homeless and parentless, and had no criminal record when the court imposed a deferred disposition for fourth degree assault.

At the time the court imposed the deferred disposition, it mentioned the possibility of a manifest injustice disposition but did not identify potential aggravating factors or the length of a future manifest injustice disposition.

When M.S. faltered in complying with his case management obligations, the court simultaneously revoked the deferred disposition and imposed a manifest injustice disposition upward for what it believed to be the maximum possible length.

The court failed to follow mandatory statutory procedures, relied on both specifically prohibited and nonstatutory aggravating factors, and lacked sufficient evidence as the basis of the manifest injustice disposition. The court further violated M.S.'s right to notice and due process. It imposed a clearly excessive sentence greater than the statutory maximum. M.S. is entitled to a new sentencing hearing.

M.S. moves this Court for accelerated review of the manifest injustice disposition.¹ RCW 13.40.160(2), 13.40.230; RAP 18.13.

B. ASSIGNMENTS OF ERROR

1. The court exceeded its authority and erred in imposing a manifest injustice disposition upward.
2. The court erred in imposing an invalid sentence in excess of the statutory maximum for the offense of conviction.
3. The court erred in entering Finding of Fact 3 in which the court found M.S. violated the terms of his deferred disposition by failing to participate in and comply with the case management process and service providers. CP 39.
4. The court erred in entering Finding of Fact 6² (p.2) that the witnesses' testimony supported aggravating factors such that a manifest injustice sentence is appropriate. CP 39.
5. The court erred in entering Finding of Fact 6 (p.3) that M.S. is a high risk to reoffend. CP 40.

¹ A manifest injustice disposition is appealable. RCW 13.40.160(2), 13.40.230. Moreover, juveniles are entitled to accelerated review of such dispositions. RAP 18.13(a), (b). M.S. noted a motion for accelerated review in his Notice of Appeal, and this Court acknowledged accelerated review in its June 1, 2018, letter to counsel. CP 35.

² Two separate Findings of Fact are labeled number six in the Findings of Fact and Conclusions of Law for Manifest Injustice Disposition Upward: one on page 2 and one on page 3. CP 39-40. M.S. assigns error to both and refers to the first as Finding of Fact 6 (p.2) and the second as Finding of Fact 6 (p.3).

6. The court erred in entering Finding of Fact 7 that M.S. lacks parental control. CP 40-41.
7. The court erred in entering Finding of Fact 9 that M.S. needs treatment and is unable to obtain services in the community. CP 41-42.
8. The court erred in entering Finding of Fact 10 that M.S. failed to comply with court orders. CP 42.
9. The court erred in entering Finding of Fact 11 that a sentence within the standard range is too lenient. CP 42-43.
10. The court erred in entering Finding of Fact 12 that any of the factors alone justified a manifest injustice departure upward. CP 43.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. The Juvenile Justice Act (JJA) prohibits courts from considering a juvenile's dependency status and the lack of facilities in the community in imposing a manifest injustice sentence. The disposition hearing and Findings of Facts and Conclusions of Law reflect that the court relied on both. Did the court err in imposing a manifest injustice sentence after considering these prohibited factors?
2. Juvenile courts derive their authority to sentence juveniles exclusively from the JJA. The JJA identifies specific mitigating and aggravating factors that courts must consider before imposing a manifest injustice sentence. Where the court considered aggravating factors not

itemized in the statute, did it exceed its authority and err in sentencing M.S. to a manifest injustice sentence?

3. The JJA and federal and state due process require proof beyond a reasonable doubt of aggravating factors before the court can impose a manifest injustice sentence. The court imposed a manifest injustice sentence on M.S. without sufficient evidence supporting the aggravating factors and based largely on the same behavior: a failure to follow rules. Did the court err in imposing a manifest injustice sentence without proof beyond a reasonable doubt of the aggravating factors?

4. Where courts rely on a need for treatment to justify a manifest injustice sentence, courts must specify the type and length of treatment needed and verify its availability before imposing sentence. The court sentenced M.S. to the maximum sentence but made no finding of the specific type or length of treatment needed, nor did the court verify such treatment was actually readily available in the Juvenile Rehabilitation Administration (JRA). Where no nexus exists between the unspecified treatment needed and the length or availability of such treatment, is the manifest injustice disposition clearly excessive?

5. Juveniles have the right to notice of charges and due process of law. The court imposed a manifest injustice sentence based on aggravating factors without giving M.S. notice of the aggravating factors

or the sentence at the time of the finding of guilt. Did the court violate M.S.'s statutory and state and federal constitutional rights to notice and due process when it imposed a manifest injustice sentence when M.S. did not have notice at the time of the finding of guilt of the specific aggravating factors on which the court relied, the facts supporting those factors, or of the actual sentence the court would impose?

6. A court lacks authority to impose a sentence in excess of the statutory maximum, which is 364 days for a gross misdemeanor. The court sentenced M.S. to 52 weeks to 52 weeks. Did the court err in imposing a sentence greater than the statutory maximum, and does the imposition of a sentence greater than the statutory maximum require resentencing?

D. STATEMENT OF THE CASE

At 16 years old, M.S. was a dependent child without parents who were able to care for him. M.S. was placed in the custody of the Department of Health and Social Services (DSHS) and had to rely on them for shelter and care. At times he struggled against his DSHS placements and was homeless. Despite these difficult circumstances, M.S. had no prior criminal convictions. CP 31. When M.S. was charged with assault, he moved for a deferred disposition. CP 11-12. The State did not oppose the motion and moved to amend the information. RP 6-7; CP 14.

The court granted the deferred disposition. CP 7-9. The court found M.S. guilty of Assault in the Fourth Degree, RCW 9A.36.041(1), (2). CP 7-8 (Findings of Fact and Conclusions of Law 1, 7); RP 18-19. At the deferred disposition hearing, the court advised M.S. of the standard range sentence he faced.³ RP 14. The court stated M.S. could receive “a higher sentence” if the court found a manifest injustice. RP 14. The court did not advise M.S. that it would find a manifest injustice sentence, nor did it advise M.S. on what specific aggravating factors it would base such a finding or the length of such a sentence. After granting the deferred disposition, the court released M.S. to DSHS for placement and compliance with community supervision. CP 8; RP 24-25.

M.S. initially struggled to succeed in the deferred disposition. After two and a half months, the court held a violation hearing at which it found M.S. violated several conditions of the deferred disposition, imposed ten days of detention, and entered an order modifying the order of deferred disposition. RP 50, 60; CP 21-22. M.S. received no other chances from the court. Following the next violation, the court granted the

³ Assault in the Fourth Degree has a Juvenile Disposition Offense Category of D+. RCW 13.40.0357. Under Option A’s Standard Range, an individual with no prior adjudications corresponds to a sentence of local sanctions. RCW 13.40.020(18) defines local sanctions as “one or more of the following: (a) 0-30 days of confinement; (b) 0-12 months of community supervision; (c) 0-150 hours of community restitution; or (d) \$0-\$500 fine.”

State's motion to revoke the deferred disposition after a joint revocation/disposition hearing. CP 24, 31-34; RP 145-47, 152-56.

Despite certain struggles, M.S. improved over the course of the deferred disposition. By the time court revoked the disposition, M.S. was staying at his placement, Cypress House, every night and complying with curfew most nights. CP 52 (noting M.S.'s compliance with curfew and "huge improvement" in returning to his placement every night); Ex. 1 (noting M.S. "has made incredible progress"). This constituted a significant improvement in M.S.'s behavior and was the first time he had achieved such stability. RP 76-77 (M.S. appeared for March 29 appointment), 93 (noting M.S.'s "incredible progress"), 115 (acknowledging improvement in complying with curfew).

The court held a single hearing to determine whether M.S. violated his deferred disposition and to impose a manifest injustice. Four witnesses testified: M.S.'s dependency attorney, DSHS social worker, Juvenile Probation Counselor (JPC), and M.S. himself. CP 38. No witnesses from Cypress House testified. M.S. denied all allegations. RP 140-144; CP 55-57.

The court rejected four of the five⁴ allegations. RP 145-47. The only proven allegation was M.S.'s "failure to participate in the case management process and failure to comply with that case management process, which is part of the conditions of the Court, that he comply with what the service providers in the community require him to do." RP 145; CP 24. More specifically, the court found that M.S. was supposed to "stay where he was supposed to stay and follow the rules there" and that he failed to do so. RP 146. Based on this sole violation, the court revoked the deferred disposition. CP 24-25; RP 153.

After revoking the deferred disposition and based on the same evidence, the court imposed what it believed to be the maximum⁵ possible sentence based on both statutory and so-called nonstatutory aggravating factors. CP 24, 31-32; CP 38-45; RP 152-56. The court found the following aggravating factors: high risk to reoffend; lacks parental control; need for treatment and inability to get services and treatment in the community; failure to comply with court orders; and standard range is inappropriate. RP 154-56; CP 32; CP 40-44 (Findings of Fact 6 (p.3), 7, 9, 10, 11; Conclusion of Law 3, 4, 5, 6).

⁴ The State alleged five violations. It withdrew one after the hearing. RP 137. However, the court still entered findings as to all five allegations, ruling only one of them substantiated. RP 145-47.

⁵ 52 weeks actually exceeds the authorized maximum sentence of 364 days. *See* Section E(3) *infra*.

The court imposed a manifest injustice disposition upward of 52 week to 52 week. CP 31-34; RP 156. The court noted the length of the sentence was “based primarily on the fact that [the child] needs to make progress in both mental health and drug/alcohol treatment programs.” CP 44 (Conclusions of Law 8); CP 32; RP 154-56.

E. ARGUMENT

1. The court erred in imposing a clearly excessive manifest injustice disposition based on prohibited and nonstatutory factors and without sufficient evidence.

a. Manifest injustice dispositions.

Juvenile courts derive their sentencing authority from the JJA. RCW 13.40.0357 requires courts to select one of four options when sentencing juvenile offenders: Option A (Standard Range), Option B (Suspended Disposition Alternative), Option C (Chemical Dependency/Mental Health Disposition Alternative), or Option D (Manifest Injustice). The JJA presumes the imposition of a standard range sentence is appropriate, and a court may impose a greater sentence only if the court finds the imposition of a standard range sentence would “effectuate a manifest injustice.” RCW 13.40.160(2); 13.40.0357.

A “manifest injustice” is “a disposition that would either impose an excessive penalty on the juvenile or would impose a serious, and clear danger to society in light of the purposes of [the JJA].” RCW

13.40.020(19). To impose such an exceptional sentence, the court must consider certain statutory mitigating and aggravating factors. RCW 13.40.150(3)(h), (i).

Courts may only impose manifest injustice sentences in those cases where extraordinary factors not already contemplated and addressed by the legislature within the standard sentencing scheme exist. *State v. Rhodes*, 92 Wn.2d 755, 760, 600 P.2d 1264 (1979), *overruled on other grounds by State v. Baldwin*, 150 Wn.2d 448, 78 P.3d 1005 (2003); *State v. Scott*, 72 Wn. App. 207, 213-14, 866 P.2d 1258 (1993) (holding aggravating factors are “legally adequate” where they were not considered in establishing standard range). To uphold a manifest injustice disposition, a reviewing court must find “the reasons . . . are supported by the record,” “those reasons clearly and convincingly support the conclusion that a disposition within the range would constitute a manifest injustice,” and the sentence is not “clearly excessive.” RCW 13.40.230(2).

b. The court erred in imposing a manifest injustice disposition upward based on aggravating factors expressly prohibited by the JJA.

The JJA identifies certain factors that courts must consider in imposing a disposition. RCW 13.40.150(3)(h), (i) (“Before entering a dispositional order . . . the court **shall** . . . [c]onsider whether or not any of

the following mitigating factors . . . [or] aggravating factors exist.”) (emphasis added). The JJA also specifically prohibits courts from considering certain itemized factors, including a respondent’s actual or suspected dependency status in determining punishment. RCW 13.40.150(4)(e) (including “[f]actors indicating that the respondent may be or is a dependent child” among things courts may not consider in “determining the punishment to be imposed”). In addition, courts may not order a commitment to JRA “solely because of the lack of facilities, including treatment facilities, existing in the community.” RCW 13.40.150(5). Here, the court impermissibly considered M.S.’s dependency statute and the lack of facilities in the community in imposing the manifest injustice sentence.

The court considered M.S.’s DSHS placement and work with DSHS social worker and attorney. CP 40-41 (Finding of Fact 7). The court made repeated references to M.S. spending his time “on the street.” CP 40-41 (Findings of Fact 6 (p.3), 7). In addition, the court questioned M.S.’s dependency attorney about “the pros and cons” of M.S. continuing to receive services in the community, as opposed to in the JRA. RP 92.

The court found M.S. was unable to receive services in the community and that he could only get the services and treatment he needed through the structure of the JRA. CP 41-43 (Findings of Fact 9,

11). The court seemed to base this on the absence of facilities where M.S. could receive appropriate treatment or services other than through the JRA. CP 42-43 (Finding of Fact 11) (referring to JRA as “the only place he will be able to successfully access” services). The court speculated that M.S. “has a better chance” of not becoming a homeless adult if the court commits him to JRA, “where he will get an education, and where he will get three meals a day, and where he will get treatment that he needs, and where he will get the services that he absolutely needs.” RP 152.

These findings and conclusions demonstrate the court impermissibly considered M.S.’s general status as a dependent child, as well as the perceived lack of available facilities in the community, in imposing a manifest injustice disposition. These considerations undermine the reliability of the manifest injustice disposition.

c. The court erred in imposing a manifest injustice disposition upward based on nonstatutory aggravating factors.

Juvenile courts derive their sentencing authority solely from the JJA. RCW 13.04.450 provides, “The provisions of chapters 13.04 [Basic Juvenile Court Act] and 13.40 [Juvenile Justice Act of 1977] RCW, as now or hereafter amended, shall be the exclusive authority for the adjudication and disposition of juvenile offenders except where otherwise

expressly provided.” The Washington Supreme Court recently affirmed this notion in *State v. Bacon*. 190 Wn.2d 458, 463, 415 P.3d 207 (2018).

In *Bacon*, a child argued juvenile courts possess inherent authority to structure appropriate sentences. He asked the Court to find the juvenile court possessed authority to grant a suspended disposition even where not explicitly authorized by the JJA. *Bacon*, 190 Wn.2d at 463. In rejecting Bacon’s argument, the Court held juvenile courts lack inherent authority to suspend dispositions except where specifically permitted by the sentencing scheme of the JJA. *Id.* at 463-64. The Court emphasized the legislature’s role in determining punishment and sentences and reaffirmed the principle that a juvenile court’s ability to impose exceptional sentences is limited to statutorily granted authority to do so. *Id.*

This Court has also acknowledged juvenile courts lack inherent authority to act outside of the statutory scheme. *See, e.g., State v. D.P.G.*, 169 Wn. App. 396, 400, 280 P.3d 1139 (2012) (strictly interpreting RCW 13.40.127 and holding court erred in failing to follow “clear command” and terms and conditions of statute in dismissing deferred disposition); *State v. Mohamoud*, 159 Wn. App. 753, 760-65, 246 P.3d 849 (2011) (reversing and remanding for sentencing where court granted deferred disposition on its own motion without specific statutory authority).

Therefore, juvenile courts must sentence juveniles within the mandates of the statute.

RCW 13.40.150(3)(i) identifies eight specific aggravating factors.⁶ It does not contain a catchall phrase permitting consideration of other factors the court may deem appropriate. Here, the court based M.S.'s manifest injustice disposition on five aggravating factors. Four of the five are not contained in the statute.⁷ The court erred in relying on these nonstatutory factors to impose a manifest injustice disposition. Cases holding otherwise fail to identify a juvenile court's statutory authority to consider such factors or rely on a now-rejected understanding of sentencing law and should be disregarded in the wake of *Bacon*.⁸

⁶ RCW 13.40.150(3)(i) lists the following as aggravating factors:

- (i) In the commission of the offense, or in flight therefrom, the respondent inflicted or attempted to inflict serious bodily injury to another;
- (ii) The offense was committed in an especially heinous, cruel, or depraved manner;
- (iii) The victim or victims were particularly vulnerable;
- (iv) The respondent has a recent criminal history or has failed to comply with conditions of a recent dispositional order or diversion agreement;
- (v) The current offense included a finding of sexual motivation pursuant to RCW 13.40.135;
- (vi) The respondent was the leader of a criminal enterprise involving several persons;
- (vii) There are other complaints which have resulted in diversion or a finding or plea of guilty but which are not included as criminal history; and
- (viii) The standard range disposition is clearly too lenient considering the seriousness of the juvenile's prior adjudications.

⁷ High risk to reoffend, lack of parental control, need for treatment and inability to get services and treatment, and standard range is inappropriate are all aggravating factors considered by the court but not identified in the statute.

⁸ Post-*Blakely*, permissible aggravating factors justifying exceptional sentences are only those identified by statute. *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Because juvenile courts have no authority to impose sentences except where specifically authorized by statute, the court erred in exceeding its statutory authority by imposing a manifest injustice sentence based on nonstatutory aggravating factors. Therefore, the Court should remand the case for resentencing.

d. The court erred in finding aggravating factors not supported by clear and convincing evidence.

In imposing the manifest injustice disposition upward, the court relied on five aggravating factors.⁹ Specifically, the court found M.S. was likely to reoffend, lacked parental control, needed treatment and was unable to get it in the community, failed to comply with court orders, and the standard range was inappropriate.

The court repeatedly based multiple aggravating factors on the same factual finding: a failure to follow rules. In finding M.S. was a high risk to reoffend (Conclusion of Law 3), the court noted “his inability to follow the rules [at Cypress House],” RP 154, and his “general inability to follow rules.” CP 40, 44 (Finding of Fact 6 (p.3), Conclusion of Law 3). In finding M.S. lacked parental control (Conclusion of Law 4), the court found “the people who are supposed to be caring for him . . . are unable to

⁹ M.S. argues juvenile courts may only consider statutory aggravating factors. *See* Section E(1)(c) *supra*. However, should the Court reject this argument, M.S. addresses the insufficiency of each aggravating factor here.

get him to follow rules.” RP 154; CP 40-41, 44 (Finding of Fact 7, Conclusion of Law 4) (“He does not follow the rules of his DSHS placement.”). In finding a need for treatment (Conclusion of Law 5), the court noted his inability to follow the structured program and unwillingness to “follow through” with what he is told to do, as well as his failure to attend services as directed. CP 41-42 (Finding of Fact 9). In finding M.S. failed to comply with recent court orders (Conclusion of Law 6), the court found M.S. “violated the terms of his pretrial release” and violated “the Court’s Order on Deferred Disposition.” CP 42 (Finding of Fact 10); RP 155. Finally, in finding a local sanction sentence was inappropriate and too lenient (Finding of Fact 11), the court reiterated the considerations and findings of the other four factors. Finding five separate aggravating factors on the basis of this same behavior further highlights the insufficiency of the evidence.

i. M.S. did not fail to comply with the conditions of a dispositional order.

The court also found M.S.’s “fail[ure] to comply with recent court orders” constituted an aggravating factor under RCW 13.40.150(3)(i)(iv). CP 42, 44 (Finding of Fact 10, Conclusion of Law 6); CP 32; RP 155. RCW 13.40.150(3)(i)(iv) identifies as a permissible aggravating factor a child’s failure “to comply with conditions of a recent **dispositional order**

or diversion agreement.” (emphasis added). The court specifically cited this subsection in finding this aggravating factor. However, this statutory aggravating factor is not a *general* failure to comply with *any* court order; it is failure to comply with conditions of two *specific* kinds of court orders: dispositional orders and diversion agreements. In this case, no such evidence existed.

A court enters a dispositional order *after* the failure of a deferred disposition. *See State v. M.C.*, 148 Wn. App. 968, 972, 201 P.3d 413 (2009) (holding that deferred disposition order means the court defers entry of an order of disposition); RCW 13.40.127(7)(b)(i), (9)(c).

RCW 13.40.160 grants courts explicit authority to defer the imposition and execution of dispositional orders under the deferred disposition statute in statutorily specified circumstances. RCW 13.40.160(10). RCW 13.40.150(3) requires that a court hold a disposition hearing “[b]efore entering a dispositional order as to a respondent found to have committed an offense.” Conduct occurring during the deferred disposition period is necessarily prior to the entry of the dispositional order. Therefore, such conduct cannot constitute a failure to comply with the conditions of a recent dispositional order under RCW 13.40.150(3)(i)(iv) because no disposition order has yet been entered.

In addition, consideration of a respondent's failure to comply with the terms of a deferred disposition is already contemplated by the deferred disposition statute itself. RCW 13.40.127(7)(b)(i) and (9)(c) grant courts the authority to revoke deferred dispositions "and enter an order of disposition" upon a finding of noncompliance. Therefore, it is a factor already contemplated by the legislature and may not be considered as an aggravating factor justifying a manifest injustice sentence.

ii. There was insufficient proof that M.S. needed specific treatment and was unable to receive it in the community.

The court found M.S.'s inability to get services, including drug, alcohol, and mental health treatment, in the community constituted the nonstatutory aggravating factor of a need for treatment justifying the manifest injustice sentence. CP 32, 41-44 (Findings of Fact 9, 11, Conclusion of Law 5). However, the record is devoid of evidence as to what specific services M.S. had been offered and was supposed to be receiving or what particular services he needed. There is insufficient evidence that M.S. suffered from a particular problem or that a specific treatment would address it.

Courts may not throw out the term "treatment" as a catchall justification for detaining juveniles in excess of the statutorily determined appropriate range. In order to rely on a need for treatment as an

aggravating factor, “the appropriate treatment must be determined by the specific needs of the offender in each case.” *See, e.g., State v. J.N.*, 64 Wn. App. 112, 117, 823 P.2d 1128 (1992) (citing *State v. Rice*, 98 Wn.2d 384, 393, 655 P.2d 1145 (1982)). In addition, the court needs to find sufficient facts that treatment is necessary and that particular treatment services are available. *Id.*

In *J.N.*, the court found the juvenile had a specific need for treatment based on an expert’s evaluation and the JPC’s report. *Id.* at 118. In *T.E.C.*, the court based its finding of treatment on the testimony of two doctors who recommended specialized treatment. *State v. T.E.C.*, 122 Wn. App. 9, 20-21, 92 P.3d 263 (2004). In *J.V.*, the court tailored the manifest injustice sentence to match the length and type of available treatment programs that would meet the specific treatment needs of the individual juvenile. *State v. J.V.*, 132 Wn. App. 533, 542, 132 P.3d 1116 (2006).

These are the sorts of specific findings necessary to justify a manifest injustice sentence. The court cannot simply find a vague need for unspecified treatment and then assume JRA will provide specific services. The court specified nothing further regarding the treatment required nor what treatment M.S. would actually receive at JRA. The court made no findings and conducted no inquiry into the length or

availability of such treatment. This factor is based on insufficient evidence.

iii. M.S. had no criminal record and was not a high risk to reoffend.

In citing M.S. as having a high risk to reoffend, the court found he had a “general inability to follow rules, get along with staff, and comply with instructions.” CP 40, 44 (Finding of Fact 6 (p.3), Conclusion of Law 3); CP 32; RP 154. It also noted several alleged incidents of behavior not resulting in criminal convictions. *Id.* However, the court failed to order or consider any sort of evaluation or assessment of M.S., and the court did not rely on any characteristics specific to the offense. The court acknowledged that M.S. had no criminal record but failed to give weight to that fact.

In *J.N.*, the court relied on a sexual deviancy evaluation performed by an expert and a report from the juvenile probation counselor. 64 Wn. App. at 114. The court used the evaluation and report as well as the specific manner in which the juvenile committed the crime, to find a high risk of reoffense. *Id.* Likewise, in *State v. T.E.H.*, the court focused on the juvenile’s increasingly aggressive behavior. *State v. T.E.H.*, 91 Wn. App. 908, 917-18, 960 P.2d 441 (1998).

This sort of detailed inquiry based on expert opinion following an individual assessment of the juvenile is lacking here. The court considered no testimony from experts. M.S. was never evaluated. The juvenile probation counselor's report addressed the revocation hearing, not the disposition hearing. There was no risk assessment performed. And M.S. did not have a history of committing crimes. Insufficient evidence supports this finding.

iv. M.S. did not lack control and cannot be blamed for DSHS's failures.

The court also found M.S. lacked parental control. The court used the term "parental control" but explained it was referring to DSHS, M.S.'s guardian, in finding "he can't be controlled by the people who are supposed to be caring for him." RP 154; CP 32; CP 40-41, 44 (Finding of Fact 7, Conclusion of Law 4). Like high risk to reoffend, the court found this factor largely based on M.S.'s inability to follow rules but made no finding of what rules in particular M.S. failed to follow. RP 154; CP 40-41 (Finding of Fact 7). Further, evidence before the court established a compliance with certain rules. RP 154. For example, at the time of the hearing, M.S. had been not only returning to Cypress House each and every night but was abiding by his curfew. *See* CP 51-52; State's Ex. 1;

RP 115. These are two rules M.S. had not previously managed to follow.

Insufficient evidence supports this aggravating factor.

v. The standard range sentence was not too lenient and was appropriate.

The court found as a separate aggravating that the standard range is inappropriate. CP 32; CP 42-43 (Finding of Fact 11). The court based this finding on its reasoning that local sanctions were “too lenient” because M.S.’s “needs cannot be met in the community” and because local sanctions would not provide M.S. with services or treatment.¹⁰ CP 42-43 (Finding of Fact 11). In support of this aggravated factor, the court reiterated the other aggravating factors, including its baseless conclusions that M.S. would likely reoffend, that M.S. “is in need of numerous services” including educational and drug and alcohol treatment services, and that the JRA is “the only place” he could receive such services. *Id.* Essentially, the court described a general troubled youth but did not make findings based on a connection to either the crime of conviction or the respondent’s culpability. In doing so, the court failed to distinguish how this crime or this offender are different and un contemplated by the standard range.

¹⁰ The court did not cite subsection viii of RCW 13.40.150(3)(i), nor would this statutory aggravating factor apply, given M.S.’s absence of prior adjudications.

Although the court itemized this as a separate finding, it is more a summary of the other aggravating factors than a separate factor. Therefore, for the reasons already explained above, M.S. argues insufficient support for this aggravating factor.

e. The court abused its discretion in imposing a clearly excessive manifest injustice disposition.

The court based the length of the manifest injustice disposition upward “primarily on the fact that [the child] needs to make progress in both mental health and drug/alcohol treatment programs.” CP 44 (Conclusion of Law 8). The court specifically noted “a year of treatment, a year of services” in imposing the sentence length. RP 156. However, the court made no specific findings as to the necessary treatment, length of treatment programs, or availability of such services.

In order to base the length of the disposition upward on the need for treatment, courts must find what treatment is needed and that the needed treatment is “available and will continue for the duration of the disposition.” *State v. S.H.*, 75 Wn. App. 1, 20, 877 P.2d 205 (1994); *T.E.C.*, 122 Wn. App. at 20. Here, the court made no findings that the JRA provided the specific services and treatment M.S. required or that such specific treatment was available. It simply concluded that M.S. needed “more treatment and counseling than can be accomplished with

local sanctions” and sentenced M.S. to the maximum term at JRA. CP 44 (Conclusion of Law 5). As such, the length of the manifest injustice sentence is excessive.

In addition, if this Court finds some of the aggravating factors were insufficient, it cannot infer the trial court would have sentenced M.S. to the same exceptional sentence; therefore, reversal and remand is required. *See State v. S.S.*, 67 Wn. App. 800, 818, 840 P.2d 891 (1992) (“Only if this court can determine that the trial court would have entered the same sentence on the basis of the remaining valid aggravating factors, however, can we affirm the exceptional sentence on appeal.”). Inclusion of boilerplate language suggesting that the court would have sentenced M.S. to the same length of the sentence on any one of the aggravating factors alone does not impact this argument. CP 43-44 (Finding of Fact 12; Conclusion of Law 7)).

2. The court erred in imposing a manifest injustice disposition without giving M.S. proper notice of the aggravating factors in violation of the statutory and constitutional rights to notice and state and federal due process.

A juvenile offender is entitled to notice of the specific aggravating factors upon which a court relies to justify a manifest injustice disposition upward. A juvenile offender is entitled to notice at the time of the plea or the finding of guilt, not just at the disposition hearing.

- a. *The deferred disposition statute mandates juveniles have notice of the direct consequences of the disposition.*

A deferred disposition allows eligible juveniles to be placed on community supervision following a plea or finding of guilt and offers them the opportunity to earn dismissal of the deferred disposition. RCW 13.40.127. Compliance with the terms of a deferred disposition results in dismissal of the deferred disposition. RCW 13.40.127(9)(a),(b). Failure to comply with the terms of a deferred disposition results in revocation of the deferred disposition and entry of an order of disposition. RCW 13.40.127(7)(b)(i), 9(c).

Courts may grant deferred dispositions only where specifically authorized by the statute. RCW 13.40.160(10); *cf. Bacon*, 190 Wn.2d at 463 (strictly interpreting JJA to find courts have no inherent authority to impose suspended sentence dispositions except where specifically authorized by statute). Further, in such eligible cases, the court must follow the requirements of RCW 13.40.127 in granting, monitoring, and resolving the deferred disposition. The court lacks inherent authority to act outside of the statutory scheme. *See, e.g., Bacon*, 190 Wn.2d at 468-69; *D.P.G.*, 169 Wn. App. at 402-03; *Mohamoud*, 159 Wn. App. at 764-65.

RCW 13.40.127(3)(d) specifically requires that juveniles acknowledge “the direct consequences that will happen if an order of disposition is entered.” Courts must secure this acknowledgement of the direct consequences when granting a deferred disposition, not when the order of disposition is entered. An order of disposition is entered when a respondent fails to comply with the terms of the deferred disposition. Thus, courts must secure an acknowledgement from the juvenile of the direct consequences of the order of deferred disposition before they may grant a deferred disposition.

The maximum sentence for a crime is a direct consequence of which defendants must be informed prior to pleading guilty. *State v. Weyrich*, 163 Wn.2d 554, 556-57, 182 P.3d 965 (2008) (due process right to voluntary plea requires defendant be informed of statutory maximum because it is direct consequence of plea); *State v. Morley*, 134 Wn.2d 588, 621, 952 P.2d 167 (1998) (courts must inform defendants of maximum sentence prior to entry of guilty plea); *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996) (finding defendant’s plea involuntary where court did not inform him of direct consequence of mandatory community placement, in addition to maximum prison sentence). Therefore, this Court should construe acknowledgement of a “direct consequence” under RCW 13.40.127(3)(d) to mean the child must acknowledge the specific

consequence he faces if the court imposes a manifest injustice disposition upward, including the identity of the aggravating factors and the sentence.

Here, after repeatedly advising M.S. of the specific standard range disposition the court could impose through entry of an order of disposition, the court told M.S. that it could sentence him to “a higher sentence” if it found “special circumstances or what we call aggravating factors.” RP 14. The court inquired, “[D]o you understand that,” to which M.S. responded, “Yes.” RP 14. The court did not inform M.S. it would, in fact, impose a manifest injustice disposition upward. It did not inform M.S. it would impose the maximum sentence. It did not inform M.S. on what aggravating factors it would rely in imposing such a sentence. Having not been informed of these specific direct consequences, M.S. failed to acknowledge them prior to entry of the deferred disposition.

The court did not secure an acknowledgement of the direct consequences of an order of disposition from M.S. prior to entering the deferred disposition. Therefore, the sentence must be reversed and remanded for sentencing within the standard range.

b. State and federal due process and the right to notice require juveniles receive actual notice of the aggravating factors before granting a deferred disposition.

The JJA specifically identifies one of its purposes is providing due process for juvenile offenders. RCW 13.40.010(2)(e). Juvenile offenders

are entitled to due process under our state and federal constitutions. U.S. Const. amends. 5, 14; Const. art. I, § 3; *In re Winship*, 397 U.S. 358, 359, 90 S. Ct. 1068, 25 L. Ed. 2d. 368 (1970). In addition to statutory requirements and due process guarantees, both state and federal constitutions provide a right to notice. U.S. Const. amend. 6 (granting accused persons the right “to be informed of the nature and cause of the accusation”); Const. art. I, § 22 (granting accused persons the right “to demand the nature and cause of the accusation against him”).

Courts have interpreted these guarantees to encompass the right to notice of aggravating circumstances justifying exceptional sentences. *See State v. Siers*, 174 Wn.2d 269, 276-77, 274 P.3d 358 (2012) (finding due process requires state provide notice of intent to prove aggravating circumstances justifying exceptional sentence prior to proceeding, even if that notice is not in charging document). This interpretation is based not only on the constitutional right to a jury trial and an accused’s right to have a jury find every fact beyond a reasonable doubt, but also on the rights to due process and notice. *See Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (“Under the **Due Process Clause** of the Fifth Amendment and the **notice** and jury trial **guarantees** of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be

charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”) (emphasis added); *see also Blakely v. Washington*, 542 U.S. 296, 301-02, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (recognizing maximum penalty is “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant”).

The due process and notice roots of *Blakely* and *Apprendi* apply to juvenile offenders.¹¹ *S.S.*, 67 Wn. App. at 807 (acknowledging existence of “due process implications” when state seeks manifest injustice disposition and noting “juvenile disposition proceedings may not violate fundamental notions of due process”); *State v. Whittington*, 27 Wn. App. 422, 618 P.2d 121 (1980) (acknowledging due process applies to juvenile offender sentencings); RCW 9.94A.537 (amended SRA to require notice of intent to seek exceptional sentence prior to plea or trial). Thus, the constitutional guarantees of notice and due process require juvenile offender receive notice of the aggravating factors on which a court will rely in finding a manifest injustice sentence.

¹¹ In *State v. Meade*, Division II held that *Blakely* does not apply to juvenile proceedings. 129 Wn. App. 918, 925, 120 P.3d 975 (2005). However, the court in *Meade* limited its analysis to *Blakely*'s reliance on the right to a jury trial. *Id.* It did not contemplate the greater due process analysis.

Due process requires not just a generic disclaimer that a finding of unspecified aggravating factors can lead to a higher sentence but an affirmative statement that the state or the court will consider such higher sentence, as well as notice of the specific aggravating factors on which the state or the court intends to rely to justify such a manifest injustice sentence. Meaningful notice must include more than the mere possibility of a manifest injustice departure simply through the existence of a statute permitting it.¹²

Here the court did warn M.S. it could later impose a manifest injustice disposition. However, it did not identify the aggravating factors on which it would rely, it did not make any factual findings supporting aggravating factors, and it did not advise M.S. as to what sentence it would impose if it did enter a disposition order. As such, M.S. did not have meaningful notice of the direct consequences at that time the court granted the deferred disposition.

¹² To the extent that Division III held otherwise in *Moro*, that reasoning was rejected in the *Apprendi/Blakely* line of cases. *State v. Moro*, 117 Wn. App. 913, 919-23, 73 P.3d 1029 (2003) (existence of statutory scheme provides sufficient notice of possible imposition of exceptional sentence, rejecting due process challenge).

c. The court violated M.S.'s rights to statutory and constitutional notice as well as state and federal due process, requiring reversal of the sentence.

The deferred disposition statute and state and federal due process and notice constitutional guarantees entitle a juvenile offender at the time of the plea or the finding of guilt to specific notice of the sentence and aggravating factors upon which a court intends to rely to justify an exceptional sentence. Here the court granted the deferred disposition without notifying M.S. that it would impose a manifest injustice disposition upward in the event M.S. failed, without notifying M.S. of the specific aggravating factors on which it would rely, and without notifying M.S. of the length of disposition it would impose based on those aggravating factors. These failures violated M.S.'s rights to due process and notice as well as his rights under the deferred disposition statute. Therefore, the Court must reverse and remand the matter for resentencing within the standard range.

3. The court exceeded its authority by imposing a sentence greater than the statutory maximum for a gross misdemeanor, the offense of conviction.

A court may not impose upon a juvenile offender a sentence in excess of the maximum sentence allowed for an adult convicted of the same offense. RCW 13.40.160(11). The maximum sentence for a gross

misdemeanor is a term of imprisonment up to 364 days. RCW 9A.20.021(2).

M.S. was convicted of Assault 4, which is a gross misdemeanor. CP 31; RCW 9A.36.041(1), (2). The court sentenced M.S. to a term of commitment to the JRA of 52 weeks. CP 31. 52 weeks could exceed 364 days, depending upon how the JRA calculates the start date. Therefore, the court sentenced M.S. in excess of the maximum permitted by statute, and M.S. is entitled to resentencing for the imposition of a sentence that is clearly within the authorized maximum. *See In re Goodwin*, 146 Wn.2d 861, 876, 50 P.3d 618 (2002) (holding “a sentence in excess of that statutorily authorized” is “fundamentally defective” and requires remand for resentencing).

F. CONCLUSION

M.S.'s sentence is unlawful and must be vacated and remanded for resentencing within the standard range. Alternatively, M.S.'s sentence is unlawful and must be vacated and remanded for resentencing within the statutory maximum.

DATED this 18th day of July 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', with a long horizontal flourish extending to the right.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 78442-1-I
v.)	
)	
M.S.,)	
)	
Juvenile Appellant.)	

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