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Division I  
State of Washington  
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No. 96894-2

NO. 78442-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

M.L.S.,

Appellant.

---

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

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REPLY OF APPELLANT

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## **A. ARGUMENT**

The reasons on which the court relied in imposing M.L.S.'s manifest injustice sentence are not supported by the record, they do not clearly and convincingly support the finding of a manifest injustice, and the sentence imposed is clearly excessive. RCW 13.40.230(2). In addition, the court considered impermissible factors and failed to provide M.L.S. with the required constitutional and statutory notice. Therefore, this Court should reverse the manifest injustice sentence and remand for imposition of a disposition within the standard range. RCW 13.40.230(3).

### **1. Insufficient evidence supports the manifest injustice disposition.**

*a. The court impermissibly considered nonstatutory aggravating factors.*

*i. The JJA only authorizes manifest injustice dispositions based on statutorily identified aggravating factors.*

Courts may not impose sentences absent express legislative authorization. Juvenile courts derive their sentencing authority from specific grants of authority in the Juvenile Justice Act (JJA). RCW 13.04.450. The JJA authorizes courts to impose exceptional sentences only where certain statutorily identified aggravating and mitigating factors exist and create a manifest injustice. RCW 13.40.150(3)(h)-(i). Nowhere does the Act authorize consideration of nonstatutory factors to justify a

manifest injustice sentence. Here, the court exceeded its sentencing authority when it considered nonstatutory factors not identified by the legislature as a permissible basis for upward departures.

In *State v. Bacon*, the juvenile appellant argued the court could impose a suspended sentence in circumstances other than those specifically itemized in the suspended sentence statute. 190 Wn.2d 458, 415 P.3d 207 (2018). Our Supreme Court rejected the argument and held “juvenile court judges lack statutory authority to suspend JJA dispositions, even manifest JJA dispositions, unless the disposition fits under one of the specifically listed exemptions in RCW 13.40.160(10).” *Id.* at 459-60.

The Court’s opinion rests on the analysis that juvenile sentencing courts do not possess inherent authority to craft sentences at their discretion but, rather, are restricted to sentences for which the legislature specifically provided in the JJA. *Id.* at 463-67. Courts may not impose exceptional sentences absent statutory authority. *Id.* at 464.

Just as the JJA gives trial courts authority to suspend sentences only in specifically identified circumstances, the JJA give trial courts authority to impose exceptional sentences only based on the specifically identified aggravating and mitigating factors. Nothing in the JJA permits courts to consider other factors or so-called nonstatutory factors. Where our legislature has provided a specific list of aggravating factors justifying

exceptional sentences, courts lack the authority to consider factors other than those identified.

- ii. The court exceeded its sentencing authority and erred in considering nonstatutory aggravating factors.

In this case, the court did not confine its consideration of aggravating factors to those identified in RCW 13.40.150(3)(i). Four of the five aggravating factors – including treatment, the one on which the court declared it relied most heavily – identified by the court as providing the basis for the manifest injustice disposition are not listed in the controlling statute. CP 32, 39-44. The court relied on only one statutory factor – failure to comply with conditions of a recent dispositional order, RCW 13.40.150(3)(i)(iv) – but insufficient evidence supports that factor. CP 32, 42, 44; RP 155; *see* Opening Brief at 16-18. By considering aggravating factors other than those statutorily permitted, the court exceeded the sentencing authority under the JJA. *Bacon*, 190 Wn.2d at 463 (finding juvenile courts lack inherent authority to sentence juveniles outside of statutory scheme provided in JJA). The Court should construe the State’s failure to address this argument as a concession. *State v. E.A.J.*, 116 Wn. App. 777, 789, 67 P.3d 518 (2003).

Because the court exceeded its authority in considering factors not identified by our legislature as permissible grounds on which to find a

manifest injustice disposition, this Court should reverse the imposition of the manifest injustice disposition and remand for resentencing within the standard range.

*b. The court impermissibly considered expressly prohibited factors.*

The court considered M.L.S.'s status as a dependent child, as well as the lack of facilities available in the community in imposing the manifest injustice sentence. CP 40-41 (referencing M.L.S.'s DSHS placement and work with DSHS social worker), 40 (referencing fact M.L.S. spends time "on the street), 41-43 (finding M.L.S. could only receive necessary services through Juvenile Rehabilitation Administration (JRA)); RP 92-94 (questioning dependency attorney about services in community versus JRA). The JJA expressly prohibits courts from considering these factors in imposing a manifest injustice sentence. RCW 13.40.150(4)(e), (5). In contemplating M.L.S.'s status as a dependent child as well as the lack of available services within the community in finding a manifest injustice, the court considered factors expressly prohibited by the legislature in violation of the JJA.

Courts may not use the JRA to house juveniles simply because the community lacks resources to house them and treat their needs or because they are dependent children. The issue of whether imprisoning children in

the JRA for minor offenses comports with the overarching goals of the JJA is an issue currently pending before our Supreme Court. *State v. B.O.J.*, Case No. 95542-5, Order (Sept. 6, 2018) (granting motion to modify commissioner’s ruling and granting motion for discretionary review, argument date not yet set), reviewing 2 Wn. App. 2d 1014, 2018 WL 500200 (2018) (not reported). The Court will also consider whether a maximum manifest injustice sentence is clearly excessive where the underlying offense is a misdemeanor offense. *Id.* Here, the court impermissibly considered M.L.S.’s dependency status and the absence of appropriate facilities in the community in imposing a maximum sentence for a misdemeanor offense. A manifest injustice sentence is inconsistent with the goals of the JJA under these circumstances.

**2. The manifest injustice disposition violates M.L.S.’s rights to notice and due process.**

*a. Notice and due process require juveniles receive notice at the time of the plea or entry of the deferred disposition of the aggravating factors which form the basis of the manifest injustice disposition.*

Juveniles are entitled to notice and due process. U.S. Const. amends. 5, 6, 14; Const. art. I, §§ 3, 22; RCW 13.40.010(2)(e) (identifying due process as purpose of JJA); *In re Winship*, 397 U.S. 358, 359, 90. S. Ct. 1068, 25 L. Ed. 2d 368 (1970). In adult sentencing, court interpret the statutory and constitutional rights to notice and due process to require not

only notice of the theoretical possibility of an exceptional sentence but notice of the specific sentence one could face and notice of the aggravating factors on which the court could rely in imposing such a sentence. RCW 9.94A.537(1) (“At any time prior to trial or entry of the guilty plea . . . the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.”); *Apprendi v. New Jersey*, 530 U.S. 466, 484, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *State v. Siers*, 174 Wn.2d 269, 276-77, 274 P.3d 358 (2012). Therefore, juveniles are also entitled to timely notice of the aggravating factors on which the court ultimately relies in imposing a manifest injustice sentence.

In addition, the JJA contains a specific statutory requirement that juveniles “[a]cknowledge the direct consequences of being found guilty and the direct consequences that will happen if an order of disposition is entered” when they enter a deferred disposition. RCW 13.40.127(3)(d). This requirement that juveniles acknowledge the direct consequence ensures juveniles knowingly agree to deferred dispositions with full awareness of the potential consequences they face should they fail to succeed under the terms of the deferral.

*b. M.L.S. did not have notice of the aggravating factors when he entered the deferred disposition; therefore imposition of the manifest injustice disposition violated his rights to notice and due process.*

Here, M.L.S. entered a deferred disposition. CP 7-9, 16-20. As part of the deferred disposition, the court found M.L.S. guilty based on stipulated facts. CP 7, 16; RP 18-19. The court later revoked the deferred disposition, held a disposition hearing, and imposed a manifest injustice disposition. CP 24, 31-34.

At the time M.L.S. entered into the disposition, he did not have notice of the identity of the aggravating factors on which the court would rely to impose the manifest injustice disposition. Although the court advised M.L.S. of the theoretical possibility of an exceptional sentence, neither the court nor the State provided M.L.S. with notice of the aggravating factors on which it would rely in seeking or imposing such a sentence. RP 14. Thus, the entry of the deferred disposition followed by the eventual manifest injustice disposition violated not only M.L.S.'s rights to notice and due process but also the statutory requirement that he acknowledge the direct consequences of the disposition. RCW 13.40.127(3)(d).

Contrary to the State's claim, informing M.L.S. he may face "a higher sentence" does not provide M.L.S. notice of the direct

consequences of the plea. Response Brief at 9. The court's general disclaimer may have provided M.L.S. with an awareness that a manifest injustice disposition was possible but it fell far short of notifying M.L.S. on what aggravating factors the court might impose such a sentence.

The court violated M.L.S.'s statutory and constitutional rights to notice and due process. The court also violated the statutory mandate that M.L.S. acknowledge the direct consequences of an order of disposition at the time the court accepted the deferred disposition. For all these reasons, this Court should reverse the manifest injustice disposition and remand 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.**

At minimum, this Court should remand the matter for resentencing within the maximum sentence permitted: 364 days. RCW 9A.20.021(2); 13.40.160(11).

**B. CONCLUSION**

The court based M.L.S.'s manifest injustice sentence on impermissible and prohibited factors and in the absence of sufficient evidence. In addition, the court violated M.L.S.'s rights to notice and due process and violated the statutory mandate that he acknowledge the direct consequences of the order of disposition before entering the deferred

disposition. Under the facts of this case, an upward departure was unnecessary to accomplish the goals of the JJA. No manifest injustice exists. This Court should reverse and remand for resentencing within the standard range.

DATED this 2nd day of October 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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