

63532-8

63532-8

NO. 63532-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

ALI SALIM,

Appellant.

REC'D

OCT 27 2009

King County Prosecutor
Appellate Unit

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

The Honorable Greg Canova, Judge

OPENING BRIEF OF APPELLANT

ERIC J. NIELSEN
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

2009 OCT 27 PM 4:27
RECEIVED
CLERK OF COURT
STATE OF WASHINGTON

TABLE OF CONTENTS

| | Page |
|---|------|
| A. <u>ASSIGNMENTS OF ERROR</u> | 1 |
| <u>Issues Pertaining to Assignments of Error</u> | 1 |
| B. <u>STATEMENT OF THE CASE</u> | 2 |
| C. <u>ARGUMENTS</u> | 5 |
| 1. SALIM WAS ENTITLED TO WITHDRAW HIS GUILTY PLEAS ENTERED IN ADULT CRIMINAL COURT BECAUSE HE DID NOT WAIVE HIS STATUTORY RIGHT TO PROCEED IN JUVENILE COURT. | 5 |
| 2. THE COURT FAILED TO DETERMINE WHETHER JUVENILE COURT WOULD HAVE DECLINED JURISDICTION. | 12 |
| D. <u>CONCLUSION</u> | 15 |

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Dillenburg v. Maxwell
70 Wn. 2d 331, 413 P.2d 940, 422 P.2d 783 (1966)..... 13

In re Personal Restraint Petition of Dalluge
152 Wn.2d 772, 100 P.3d 279 (2004)..... 6, 10, 11, 13, 14

Nelson v. Seattle Municipal Court
29 Wn. App. 7, 627 P.2d 157
review denied, 96 Wn.2d 1002 (1981)..... 8, 9, 11

Sheppard v. Rhay
73 Wn.2d 734, 440 P.2d 422 (1968)..... 7, 11, 13

State v. Anderson
83 Wn. App. 515, 922 P.2d 163 (1996)
review denied, 131 Wn.2d 1009, 932 P.2d 1255 (1997) 6, 12

State v. Mendoza-Lopez
105 Wn. App. 382, 19 P.3d 1123 (2001)..... 6, 8, 9

State v. Pritchard
79 Wn.App. 14, 900 P.2d 560 (1995)
review denied, 128 Wn.2d 1017, 911 P.2d 1342 (1996) 12

State v. Werner
129 Wn.2d 485, 918 P.2d 916, 921 (1996)..... 6

RULES, STATUES AND AUTHORITIES

RCW 13.04.021 5

RCW 13.04.030 6

RCW 13.40.110 6, 13

A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding appellant waived his right to proceed in juvenile court.

2. The trial court erred in entering the order denying appellant's motion to withdraw his guilty pleas.

3. The trial court erred in failing to inquire whether the juvenile court would have declined jurisdiction.

Issues Pertaining to Assignments of Error

1. Appellant pleaded guilty to two felony charges in adult criminal court. Before sentencing, appellant moved to withdraw his pleas on the grounds he was 17 years old and a juvenile. He also moved to transfer his case to juvenile court to hear the motion to withdraw his pleas. The court denied the motion to transfer and held a hearing on the motion to withdraw the pleas. The court found appellant intentionally misrepresented his age and therefore waived his right to juvenile court jurisdiction. Where the court did not find appellant willfully deceived the court regarding his age and the facts do not satisfy the purpose for the rule a juvenile can waive juvenile court jurisdiction by deception, did the court err in ruling appellant waived juvenile court jurisdiction and in denying appellant's motion to withdraw his guilty pleas?

2. The Washington State Supreme Court has held that if a defendant is no longer a juvenile but should have been proceeded against as a juvenile, the trial court is required to hold a hearing to determine if the juvenile court would have declined jurisdiction before finding that the juvenile waived juvenile court jurisdiction. Where the court failed to hold that hearing should appellant's case be remanded to the trial court for such a hearing?

B. STATEMENT OF THE CASE

Ali Salim was charged in King County Superior Court with vehicle prowl in cause number 08-C-12384-3 and residential burglary in cause number 08-1-11708-8. CP 1-3, 49-50; RP 4.¹

On February 19, 2009, Salim pleaded guilty to both charges. At the plea hearing Salim was asked if his date of birth was January 1, 1990 and he answered "Uh hm." RP 5. Salim's written statements on plea of guilty identified January 1, 1990 as his date of birth. CP 4-22, 51-65.

Prior to sentencing Salim retained new counsel. On April 9, 2009 counsel moved to withdraw the pleas contending the court did not have jurisdiction because Salim was born April 20, 1991, making him only 17 years old when his guilty pleas were entered. CP 70-72. In support of the motion counsel averred Salim's mother, Fadumo Mohamed, told counsel

¹ RP refers to the verbatim report of proceedings for February 19, 2009, April 17, 2009 and April 24, 2009, which are sequentially numbered.

Salim was born in Brawa, Somalia, on April 20, 1991 and he attached a faxed copy of a Birth Certificate from Mogadishu, Somalia dated March 10, 1992, confirming Salim was born April 20, 1991. Id.² Salim also moved to transfer the case to the juvenile court division for a hearing on his motion to withdraw his pleas. CP 67-69.

On Friday, April 17, 2009, the court held a hearing on the motion to transfer the case to the juvenile court division. RP 16-19. Defense counsel argued based on the birth certificate there was a genuine issue regarding Salim's age and the juvenile court division was the appropriate forum to determine Salim's age and whether to decline jurisdiction if it found Salim was 17 years old. RP 18-19.

The court ruled before it could transfer the case it had to first conclude there was a basis to withdraw the plea or the State had to file charges against Salim in the juvenile court division, which as a practical matter it could not do because Salim was to turn 18 years old the Monday following the hearing. RP 29, 35-36. The court denied the transfer motion. RP 36-37.

On April 24, 2009 a hearing was held on the motion to withdraw the pleas. Mohamed, Salim's mother, testified Salim was born in Brawa, Somalia, on April 20, 1991. RP 41-42. The family came to the United

² Counsel noted Salim's mother did not receive the faxed birth certificate until March 27, 2009. RP 23.

States December 15, 1997. RP 42. When they immigrated, Salim's father also brought another boy with them to the United States. RP 43-45. The other boy was mistakenly given Salim's birth date. RP 49. Mohamed said that when she enrolled Salim in school, and when Salim applied for his driver's license, she gave his birth date as January 1, 1990 because she was told if she gave his real birth date the family would be deported for initially giving the government false information. RP 45, 47.

Salim testified he has known his date of birth was April 20, 1991 since moving to the United States. RP 52. He said when he signed the plea forms, which identified his date of birth as January 1, 1990, he was following the advice of his attorneys to plead guilty and did pay attention to the date of birth. RP 52, 54-55. Salim also signed a plea form in Snohomish County Superior Court on April 8, 2009 and the form had the January 1, 1990 date of birth. RP 56. He said he did not tell his attorney in that case he was only 17 years old because he did not think it would make any difference. RP 57-58. Salim said he did not intend to deceive the court regarding his age. RP 53.

The court found the Somali community may have told Mohamed that if she changed Salim's date of birth on official documents the family risked deportation. The court found "that's the real reason" the misrepresentation as to Salim's date of birth was "intentionally made."

RP 66. The court also found the fear deportation was the possible reason Salim himself continued to misrepresent his birth date on official documents. RP 66. The court found although Salim's misrepresentation of his date of birth on the plea documents "may well be based completely on the fact that his understanding was the he'd be deported if he tried to change it..." because he knew his correct birth date, there was an "intentional misrepresentation of Mr. Salim's age made by Mr. Salim at the time of the pleas..." and when he applied for a driver's license. RP 67. The court concluded that based on that intentional misrepresentation Salim waived juvenile court jurisdiction and there was no basis to grant the motion to withdraw the pleas. RP 70-71; CP 24.

Salim was given a standard range sentence of 9 months on the residential burglary charge and a 12-month suspended sentence on the vehicle prowl charge. CP 36-41, 74-76.

C. ARGUMENTS

1. SALIM WAS ENTITLED TO WITHDRAW HIS GUILTY PLEAS ENTERED IN ADULT CRIMINAL COURT BECAUSE HE DID NOT WAIVE HIS STATUTORY RIGHT TO PROCEED IN JUVENILE COURT.

Juvenile court is a division of the superior court. RCW 13.04.021. Juvenile court divisions have exclusive original jurisdiction over all proceedings related to persons under the age of 18 alleged to have

committed certain offenses. RCW 13.04.030.³ The juvenile court can transfer its jurisdiction to the adult criminal division of the superior court under RCW 13.40.110. That statute requires a hearing to determine whether declination of juvenile court jurisdiction would be in the best interest of the juvenile or the public. State v. Anderson, 83 Wn. App. 515, 518, 922 P.2d 163 (1996), *review denied*, 131 Wn.2d 1009, 932 P.2d 1255 (1997). Without such a hearing, the adult criminal division lacks jurisdiction over juveniles. State v. Werner, 129 Wn.2d 485, 494, 918 P.2d 916, 921 (1996).

A juvenile can, however, waive the right to the juvenile court division jurisdiction but it is limited to the circumstance where a juvenile willfully deceives the court. “Washington courts have held that under very limited circumstances, where a juvenile willfully deceives an adult criminal court into believing that he or she is an adult and does not correct the error, the defendant waives his or her right to proceed in juvenile court, and adult criminal court jurisdiction can be deemed proper on that basis alone.” In re Personal Restraint Petition of Dalluge, 152 Wn.2d 772, 781, 100 P.3d 279 (2004) (citations omitted); see, State v. Mendoza-Lopez, 105 Wn. App. 382, 387, 19 P.3d 1123 (2001) (“An underaged defendant waives his or her statutory right to a declination hearing when

³ There are exceptions but those are not applicable. See, RCW 13.04.030(1)(e).

the defendant willfully deceives the trial court into believing that he or she is more than 17 years old...”). There are two Washington cases where the courts have found a defendant waived the right to juvenile court jurisdiction.

In Sheppard v. Rhay, 73 Wn.2d 734, 735, 440 P.2d 422 (1968), Sheppard was tried and convicted as an adult. Id. at 734. Nine years later Sheppard filed for a writ of habeas corpus alleging he was 17 years old at the time of his trial but was not treated as a juvenile or afforded a decline hearing. Id. at 735. The trial court held a hearing and found Sheppard waived his right to be heard in juvenile court.

Sheppard gave the same birth date several times when arrested in the past, he signed two documents under oath and in each he swore that he was 18 years of age, he had competent counsel appointed to represent him and before his conviction of the current offense he entered a plea of guilty and was placed on probation as an adult. Sheppard v. Rhay, 73 Wn.2d at 739. The Sheppard Court found that “under the unique facts of the case” Sheppard willfully deceived the court and therefore waived his right to be heard in juvenile court. Id. The Court explained the rationale for the rule a juvenile can waive juvenile court jurisdiction by deception was two-fold: it relieved trial courts of the burden of carrying out independent investigations to determine defendants’ ages and prevented underage

defendants from gambling on a not guilty verdict in an adult trial and then, if found guilty, getting a second chance in juvenile court. Id. at 740; see, Mendoza-Lopez, 105 Wn.App at 389 (same).

In Nelson v. Seattle Municipal Court, 29 Wn. App. 7, 627 P.2d 157 *review denied*, 96 Wn.2d 1002 (1981), the court likewise found a waiver of juvenile court jurisdiction. Nelson, who was 17 years old, told police she was 19 years old when she was arrested for prostitution. She was tried and convicted for prostitution and given a 1 year deferred sentence. When she was arrested for a probation violation, she asserted she was only 17 years old at the time of trial and therefore the court lacked jurisdiction to revoke her sentence. Id. at 7-9. Nelson had a long history of contacts with the juvenile court system, had spent months at Maple Lane and was on parole from Maple Lane when she was arrested. Id. at 8. Following a hearing, the municipal court found Nelson willfully deceived the court into believing she was an adult and therefore waived her right to juvenile court jurisdiction. Id. at 8-9.

This Court agreed with the municipal court. It held Nelson waived her right to be treated as a juvenile.

This is not a case where a confused or naive youngster has inadvertently become enmeshed in the adult criminal law system.

It is rather a case where a sophisticated, street-wise juvenile, with an extensive juvenile record, is attempting to manipulate the legal system to her own benefit. By her intentionally deceptive conduct, she avoided juvenile court where she would have been connected to her record there and treated accordingly. She opted instead to go to adult court where she received a deferred sentence. It was only when it appeared likely she would go to jail because of her probation violations that she claimed her rights as a juvenile. This the law will not countenance.

Nelson v. Seattle Municipal Court, 29 Wn. App. at 10.

On the other hand, in State v. Mendoza-Lopez, *supra*, the court held Mendoza-Lopez did not waive his right to a declination hearing. Mendoza-Lopez did not assert his right to a declination hearing until almost three years after he pleaded guilty and was facing federal gun charges. State v. Mendoza-Lopez, 105 Wn. App. at 388. During the plea hearing, Mendoza-Lopez stood mute when his attorney told the court he was 19 years old. However, when Mendoza-Lopez was earlier stopped by police he produced a Washington identification card that gave his birth date as August 6, 1978 and on his plea form he wrote he was 17 years old. Id. at 385. Based on these facts the court held the evidence did not show he attempted to willfully deceive the court about his age and therefore did not waive his right to a declination hearing. Id. at 389.

Here, the evidence shows Salim was born April 20, 1991, making him 17 years old at the time he entered his guilty pleas. The January 1,

1990 birth date was mistakenly given to government officials when the family immigrated to the United States from Somalia. Although Salim knew his correct birth date was April 20, 1991, he continued to use the January 1, 1990 when he applied for a driver's license and his mother used the date when she enrolled him in school because he and his family were told that if they tried to correct his birth date they would be deported. When Salim signed the plea forms here and in a subsequent Snohomish County case he did not mention to his attorneys that his birth date was incorrect because his attorneys advised him to plead guilty and he did not know his birth date would make a difference.

The court found Salim and his mother continued to use the January 1, 1990 birth date on official documents because they were likely afraid of deportation if they attempted to correct it. Nonetheless, the court concluded that because Salim knew his correct birth date yet used the January 1, 1990 date on official documents and did not correct it on the plea forms, he intentionally misrepresented his age and waived his right to juvenile court jurisdiction.

There is no finding, however, Salim attempted to willfully deceive the court regarding his age. In Dalluge, the Court held a waiver of juvenile court jurisdiction can only be found under the "very limited circumstances, where a juvenile willfully deceives an adult criminal court

into believing...” he is an adult. In re Personal Restraint Petition of Dalluge, 152 Wn. 2d at 781. While the court found Salim intentionally misrepresented his age, which he admitted, it did not find nor does the evidence show Salim did so to deceive the court into believing he was an adult. As the court recognized, the “real reason” Salim used the January 1, 1990 was fear of deportation and not to willfully deceive the court regarding his age. RP 66-67. Absent a finding Salim willfully deceived the court into believing he was an adult, this is not one of those “very limited circumstances” where the facts show a waiver.

Moreover, unlike the defendant in Nelson, who was sophisticated and street-wise and asserted she was denied her rights as a juvenile only after it appeared likely she would go to jail because of a probation revocation, Salim raised the issue before sentencing, there is no evidence he raised the issue because he was attempting to gain some advantage and there is no evidence or finding he is sophisticated or street-wise. And, unlike in the defendant in Sheppard, Salim raised the issue of his age in the trial court while he was still a juvenile and not years later in a personal restraint petition.

In addition, application of the waiver rule here is not supported by the Sheppard Court’s rationale justifying the rule. The court was not required to carry out an independent investigation to the determine Salim’s

age and Salim pled guilty and had not yet been sentenced so he was not gambling on a not guilty verdict or favorable sentence in an adult trial. Sheppard, 73 Wn. 2d at 740.

There is no finding Salim willfully deceived the court regarding his age because the evidence does not support such a finding. Likewise, the rationale supporting the waiver rule is not satisfied under the facts in this case. The court's conclusion Salim waived juvenile court jurisdiction by deception is unsupported. Because the court did not have jurisdiction when Salim entered the guilty pleas this Court should remand to the trial court with orders it allow Salim to withdraw his pleas.⁴ State v. Anderson, 83 Wn. App. 522; see, State v. Pritchard, 79 Wn.App. 14, 900 P.2d 560 (1995) *review denied*, 128 Wn.2d 1017, 911 P.2d 1342 (1996) (if a juvenile court erroneously declines jurisdiction, an adult criminal court lacks jurisdiction to enter judgment and sentence).

2. THE COURT FAILED TO DETERMINE WHETHER JUVENILE COURT WOULD HAVE DECLINED JURISDICTION.

The court here limited its inquiry at the hearing into whether Salim intentionally misrepresented his age. It was required to do more.

⁴ Because Salim is now an adult remand should be to the superior court. State v. Anderson, 83 Wn. App. at 522.

In Dalluge, the Court held “absent automatic decline by statute, actual decline by the juvenile court, or waiver based on deception that has been confirmed by a juvenile court or a substitute Dillenburg hearing in adult court, Washington courts have held that the adult criminal court lacks jurisdiction over a juvenile's proceeding.” Dalluge, 52 Wn. 2d at 783 (emphasis added) (citations omitted). A Dillenburg hearing is a reference to Dillenburg v. Maxwell, 70 Wn. 2d 331, 413 P.2d 940, 422 P.2d 783 (1966), where the Court ruled before there is a valid waiver of juvenile court jurisdiction a judicial hearing must be held on the issue of whether the juvenile should be tried as a juvenile or as an adult. Dillenburg v. Maxwell, 70 Wn. 2d at 343; see, RCW 13.40.110 (requiring a hearing to determine whether declination of juvenile court jurisdiction would be in the best interest of the juvenile or the public).

The Dalluge Court addressed the issue of a juvenile waiving his right to be tried in juvenile court in the context of a Dillenburg hearing. The Court explained “even where Washington courts have found the juvenile waived his or her right to proceed in juvenile court, adult criminal court jurisdiction was not proper until either the juvenile court also waived its jurisdiction or the adult criminal court confirmed that the juvenile court would have waived its jurisdiction in that case.” Dalluge, 52 Wn. 2d at 782. In Sheppard, for example, where the Court enunciated the waiver of

juvenile court jurisdiction by deception rule, the Sheppard Court acknowledged the trial court also inquired into whether transfer to adult court “would have been merited.” Sheppard v. Ray, 73 Wn. 2d at 740.

The hearing here did not address whether “the juvenile court would have waived its jurisdiction” and the court made no findings on that issue. Under the holding in Dalluge, even in the context of a waiver by deception the court must determine whether the juvenile court would have waived its jurisdiction. That was not done. Thus, if this Court does not agree Salim is entitled to withdraw his guilty pleas, in the alternative, this Court should remand the case to the superior court for a hearing to determine whether the juvenile court would have waived its jurisdiction and order the court to set aside Salim’s guilty pleas and hold a new trial if it finds the juvenile court would not have waived jurisdiction. Dalluge, 52 Wn. 2d at 785-786.

D. CONCLUSION

For the above reasons this case should be remanded and the trial court ordered to allow Salim to withdraw his guilty pleas. In the alternative, this case should be remanded to the trial court for a hearing on the issue of whether the juvenile court would have declined jurisdiction.

DATED this 27 day of October, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



ERIC J. NIELSEN
WSBA No. 12773
Office ID No. 91051

Attorneys for Appellant

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

| | | |
|----------------------|---|-------------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 63532-8-I |
| |) | |
| ALI SALIM, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27TH DAY OF OCTOBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ALI SALIM
14330 30TH AVENUE NE
SEATTLE, WA 98125

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF OCTOBER, 2009.

x *Patrick Mayovsky*

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 OCT 27 PM 4:27