

63828-9

63828-9

NO. 63828-9-1

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

STATE OF WASHINGTON,

Respondent,

v.

R.S. (DOB 6/17/94),

Appellant.

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

The Honorable Carol A. Schapira, Judge

MOTION FOR ACCELERATED REVIEW/
OPENING BRIEF OF APPELLANT

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Today I deposited in the mails of the United States of America a property stamped and addressed envelope directed to attorneys of record of respondent/appellant/plaintiff containing a copy of the document to which this declaration is attached.

Kris Canty, Jr.
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Kris Canty, Jr.
Name Done in Seattle, WA Date 9/30/09

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A. ASSIGNMENTS OF ERROR

1. The court erred in imposing a manifest injustice disposition. CP 20, 22; RP 24-26.

2. The court erred in relying on uncharged offenses to impose a manifest injustice disposition.

3. The court erred in relying on appellant's positive adjustment to detention as an aggravating factor to support the disposition.

4. The court erred in failing to consider mitigating factors in determining whether to impose a standard range disposition.

5. The court erred in failing to comply with RCW 13.40.160(2) and JuCR 7.12(e) where the disposition order fails to identify the reasons for the court's conclusions or the record on which the court based the manifest injustice disposition.

6. The court erred in imposing a disposition of 48-52 weeks in custody.

Issues Pertaining to Assignment of Error

1. Did the court's reliance on unproven allegations relating to uncharged offenses violate due process and the presumption of innocence?

2. Other courts have used a juvenile's poor behavior and poor adjustment to detention as an aggravating factor supporting a manifest injustice disposition. Is it illogical and improper to allow a disposition court to use a juvenile's positive behavior and excellent adjustment to detention as an aggravating factor?

3. Does the record show the court erred in failing to consider two statutory mitigating factors?

4. Where the court erred in relying on at least two improper aggravating factors and failed to consider two mitigating factors, should this Court vacate the disposition order and remand for a new disposition hearing?

5. Did the court fail to follow its statutory and court rule obligation to enter reasons for its manifest injustice disposition and to identify those portions of the record necessary for review of the disposition?

6. Where the court orally relied on several improper factors and did not state it would impose a manifest injustice disposition solely on proper factors, does the absence of written findings and conclusions make it impossible to fairly affirm this disposition?

B. STATEMENT OF THE CASE

On April 7, 2009, the King County prosecutor charged juvenile appellant R.S. with residential burglary and third degree malicious mischief. CP 1-2. On July 10, 2009, R.S. pled guilty to residential burglary. The state dismissed the malicious mischief charge. CP 11-16; RP 3-12. The plea did not admit factual allegations set forth in the certification for determination of probable cause. CP 15; RP 11.

Based on R.S.'s criminal history, the standard range for the offense was 0-30 days of detention, 0-12 months of supervision, 0-150 hours of community service, and 0-\$500 fine. CP 12; RP 6-7. The prosecution agreed to recommend 20 days in detention with no probation or supervision. CP 10; RP 14.¹

By the time of the plea and disposition hearing, R.S. was 15 years old. He had served 82 days in custody. RP 14.

Defense counsel argued there were mitigating factors in that (1) the behavior neither caused nor threatened harm to others, and

¹ The plea and disposition hearing occurred immediately following R.S.'s plea to a different offense, possession of a stolen vehicle. For that offense the state recommended 15 days in detention, 12 months of supervision, 36 hours of community service, and financial obligations. The dispositions would be served consecutively. RP 13-14, 26.

(2) there had been at least a year between the current offense and a prior criminal offense. RP 21. Defense counsel asked the court to waive all nonmandatory financial obligations and to grant credit for the time that had been served. RP 21.

Although the prosecutor and defense counsel had recommended a standard range disposition, the probation counselor had a different idea. She recommended a manifest injustice disposition of 48-52 weeks. RP 14.

She recognized R.S. was a very "likable young man" who had done "exceptionally well" while in detention. RP 15. She admitted there were no parole violations associated with these offenses. He had done well during a previous commitment to Echo Glen. RP 15-16.

She also noted he did not attend school when he was released to the community. RP 15-16. There was a longstanding lack of parental control, dating back at least to six years ago when he and his brother had moved to Washington from his mother's custody in Iowa. His father was a single parent who worked as a card dealer in a casino. His father and his oldest sister and reported that R.S. and his older brother did not follow anyone's directions. RP 16.

The probation counselor also referred to a month in 2008 where R.S.'s father had gone to Cambodia and no one was there to supervise the brothers. She said this occurred shortly after a search warrant was served and "there were hundreds of thousands of dollars' worth of stolen property, firearms, all kinds of things that were found in the bottom floor of the house where [R.S.] and his brother" used to reside. RP 17. She referred to police report, which referenced other burglaries and stolen property found in his home. RP 19.

She said R.S. had no "prosocial associates." RP 19. He was about to become a father with a 17-year-old girlfriend. She said he conducted himself in the community "in an adult-like manner" but without "the skills or maturity level to run around in the community acting as an adult." RP 19.

She concluded "he does fine when he's in a secure, structured environment where he can be supervised closely, where he doesn't have the opportunity to act on his impulses." RP 15. She said this was necessary to keep the community safe, referring to "a large group of very few juveniles but many adults out there committing many, many burglaries where they are carrying BB guns that look like real guns as well as actual firearms[.]" RP 18.

She felt she could not “provide [R.S.] with the treatment that he needs and protect the community without the manifest injustice[.]” RP 20.²

In response to the probation counselors’ recommendation, defense counsel argued the state had not charged any other alleged burglary or weapon offense. Those matters were not properly before the court for consideration in this disposition. RP 21-22. The Legislature contemplated the standard range based on R.S.’s criminal history and the current offense. RP 22.

The court nonetheless followed the probation counselor’s recommendation. The court’s oral ruling initially identified as “an important mitigating [sic] factor – not to say this is the most important – is the lack of family control and the lack of positive behavior in the community.” RP 24-25. The court stated R.S. had not been able to stay in a school program nor was there any family control responding to his needs. RP 25.

The court directly relied on uncharged offenses, stating it “has to also take into account that while both of these charges are serious they are a very pale version of the array of things that have

² The probation counselor’s written report has been filed with this Court by agreement of the parties. It parallels her oral remarks at the hearing.

happened. [R.S.]’s home was filled with stolen property, including firearms which of course he’s forbidden to have so the standard range substantially understates what is a fair amount of time, whether it would be in detention or at JRA.” RP 25.

The court then noted R.S. “seemed to respond in a satisfactory way” while he was in JRA before. The court noted he “[c]ommitted one of these offenses within a month of his release.” RP 25.

The court also stated R.S. was “about to be a father or perhaps he is already a father, is not in any way up to date with his schooling, his preparation to return to the community and be involved in positive activities like school and other things which is appropriate for someone who is his age.” RP 26.

The court then imposed a 48-52 week disposition for the residential burglary, with 72 days of credit for time served. CP 20, 22; RP 26. The court imposed no supervision time, concerned that it would “interfere with the ability of parole to find services for [R.S.] and reintegrate him back into the community.” RP 27.

The court then gave R.S. a short “pep talk,” informing him he was young and he could make this time in JRA a positive experience. RP 27-28.

C. ARGUMENT

1. THE COURT ERRED WHEN IT BASED THE MANIFEST INJUSTICE DISPOSITION ON INVALID AGGRAVATING FACTORS AND WHEN IT FAILED TO CONSIDER MITIGATING FACTORS.

a. A Manifest Injustice Disposition Cannot be Affirmed Unless the Record Shows Beyond A Reasonable Doubt the Disposition Is Warranted.

A court may impose a disposition outside the standard range only if it determines a disposition within the standard range would "effectuate a manifest injustice." RCW 13.40.160(2). "Manifest injustice" means a disposition that would impose a serious and clear danger to society. RCW 13.40.020(17).

To uphold a disposition outside the standard range, this Court must be able to find substantial evidence in the record to support the juvenile court's reasons. State v. Meade, 129 Wn.App. 918, 921, 120 P.3d 975 (2005); RCW 13.40.230(2). The court's findings of fact must also be supported by substantial evidence. State v. Minor, 133 Wn. App. 636, 646, 137 P.3d 872 (2006), reversed on other grounds, 162 Wn.2d 796, 174 P.3d 1162 (2008). Evidence is substantial only if it is "sufficient to persuade a fair-minded, rational person of the finding's truth." Meade, 129 Wn. App. at 922.

The court's reasons for imposing the disposition must also be valid as a matter of law, and must clearly and convincingly support the manifest injustice disposition. RCW 13.40.230(2); State v. S.S., 67 Wn. App. 800, 814-15, 840 P.2d 891 (1992) (improper reasons cannot be used to support exceptional sentence). The "clear and convincing" standard is equivalent to "beyond a reasonable doubt." State v. Rhodes, 92 Wn.2d 755, 760, 600 P.2d 1264 (1979), overruled on other grounds, State v. Baldwin, 150 Wn.2d 448, 461, 78 P.3d 1005 (2003). "When an appellate court reviews a finding of manifest injustice, the reasoning of the trial court is held to a stringent standard." 58 Wn. App. 215, 219, 795 P.2d 134, 805 P.2d 247 (1990).

Before the disposition may be affirmed on appeal, the record must therefore support, beyond a reasonable doubt, the reasons given for finding a manifest injustice. Meade, 129 Wn. App. at 922. "Whether a court's reasons justify a departure from the standard range is a question of law." State v. K.E., 97 Wn. App. 273, 279, 982 P.2d 1212 (1999) (citation omitted). Whether substantial evidence supports a finding is also a question of law. State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). Questions of

law are reviewed de novo. Hanson v. City of Snohomish, 121 Wn.2d 552, 556, 852 P.2d 295 (1993).

b. The Court Erred in Relying on Uncharged Offenses to Support the Disposition.

Our criminal justice system presumes a person innocent until proven guilty beyond a reasonable doubt. This fundamental due process right applies to all, including juveniles. U.S. Const. amend. 14; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

A disposition court's reliance on unproven allegations violates the presumption of innocence. State v. Melton, 63 Wn. App. 63, 72, 817 P.2d 413, rev. denied, 118 Wn.2d 1016 (1992). Moreover, where there has been at least one year between the juvenile's current offense and any prior offenses, such constitutes a statutory mitigating factor the court must consider, not an aggravating factor. RCW 13.40.150(3)(h)(v).

There can be no question the trial court relied on uncharged offenses to impose the disposition. RP 25 ("The court has also to take into account that while both of these charges are very serious they are a very pale version of the array of things that have happened. [R.S.]'s home was filled with stolen property, including

firearms which of course he's forbidden to have so the standard range substantially understates what is a fair amount of time, whether it would be in detention or at JRA"). This was constitutional error.

This Court's decision in State v. T.C., 99 Wn. App. 701, 995 P. 2d 98 (2000), does not lead to a different result. The T.C. court addressed whether juvenile courts could consider admitted but unproven criminal conduct at a disposition hearing to determine the juvenile's risk of reoffending. T.C., 99 Wn. App. at 708. The court distinguished Melton because T.C. admitted the uncharged acts. T.C., 99 Wn. App. at 708 (presumption of innocence does not apply to "admitted facts that otherwise constitute criminal conduct"). No such distinction exists here. Where R.S. did not admit the uncharged conduct, Melton controls.

c. A Positive Adjustment to Detention Is Not an Aggravating Factor.

The probation counselor noted several times that R.S. had done very well while he was in detention. RP 15, 18, 20. The disposition court appears to have relied on those assertions, noting R.S. had been to JRA where he "seemed to respond in a satisfactory way while he was there." RP 25. This was error.

Courts have imposed manifest injustice dispositions based on poor behavior in detention. See e.g., State v. Sledge, 133 Wn.2d 828, 837, 844, 846, 947 P.2d 1199 (1997) (noting trial court's reliance on juvenile's behavioral problems in detention); accord, Minor, 133 Wn. App. at 641). This would be a nonstatutory aggravating factor. See RCW 13.40.150(3)(i) (listing statutory aggravating factors).

But if poor behavior in detention is an aggravating factor, the state must now explain how excellent behavior³ can also be an aggravating factor.⁴ The court's and probation counselor's position is neither logical nor reasonable. Aggravating factors are not a "heads I win, tails you lose" game for the government. A factor can be aggravating or mitigating, but as a matter of basic fairness and

³ RP 15 ("he has done remarkably well . . . I'm getting kudos about once a week about what a great kid he is and how great his attitude is and ignoring negative behavior. I mean he's done exceptionally well"); RP 20 ("he's doing so well right now in detention, he's just – he's killing them, he's doing great").

⁴ Although the state did not recommend a manifest injustice disposition below, it now appears to be in the unenviable position of defending that disposition in this Court. See State v. Poupart, 54 Wn. App. 440, 449, 773 P.2d 893 (1989) (state's appellate defense of manifest injustice disposition did not violate plea agreement to recommend standard range); accord, State v. Talley, 134 Wn.2d 176, 182-88, 949 P.2d 358 (1998) (prosecution's participation in court-ordered evidentiary hearing on aggravating factors does not violate plea agreement to recommend a standard range sentence).

logic, it cannot be both. See e.g., State v. S.S., 67 Wn. App. at 813 (occurrence of a most recent offense more than one year prior to the current offense was a mitigating factor, not an aggravating factor of "recent" criminal history).

As defense counsel argued below, R.S. should not be punished for his good behavior in detention. RP 23. The court's reliance on this factor was error.

d. The Court Failed To Find Two Mitigating Factors.

Before entering a dispositional order, the court is required to consider whether statutory mitigating factors exist. RCW 13.40.150(3)(h); State v. J.V., 132 Wn. App. 533, 540-41, 132 P.3d 1116 (2006). The statute identifies two mitigating factors when "[t]he respondent's conduct neither caused nor threatened serious bodily injury or the respondent did not contemplate that his or her conduct would cause or threaten serious bodily injury", and "[t]here has been at least one year between the respondent's current offense and any prior criminal offense." RCW 13.40.150(3)(h)(i), (v). As defense counsel argued, RP 21, the predisposition report established both of

these factors.⁵ The court erred in failing to find them or consider them.

There are no written findings. The court's oral ruling makes no mention of "mitigating" factors.⁶

In State v. N.E., this Court held the trial judge appropriately considered mitigating factors where the judge stated she had carefully reviewed the juvenile probation counselor's written report incorporating the mitigating factors. State v. N.E., 70 Wn. App. 602, 607, 854 P.2d 672 (1993). "In the absence of any argument from trial counsel regarding the impact of the mitigating factors, there is no requirement that the judge expressly state she has considered the mitigating factors." Id. According to State v. Bevins, N.E. did not discard the requirement that the disposition judge consider mitigating factors. State v. Bevins, 85 Wn. App. 281, 284, 932 P.2d 190 (1997). Rather, the trial court is not required to formally state it considered a mitigating factor when the record was clear the court had done so. Id.

⁵ See e.g., State v. J.V., 132 Wn. App. 533, 544-45, 132 P.3d 1116 (2006) (aggravating factor of "recent" criminal history did not include an offense committed 50 weeks earlier).

⁶ The court mistakenly referred to "lack of family control" and "lack of positive behavior in the community" as a "mitigating factor." RP 24-25.

Here, trial counsel specifically argued the mitigating factors. RP 21. The court did not mention them. Even under the charitable rule of N.E., this is error.

The approach taken by cases like N.E. and Bevins cannot be squared with elementary principles of statutory construction. Under RCW 13.40.150(3)(h), the court shall "consider" whether mitigating factors exist." Under RCW 13.40.150(3)(i), the court must also "consider" whether aggravating factors exist. The statute uses the same word - "consider" - for both mitigating and aggravating factors. When the same words are used in a statute, "we must presume that the Legislature intended the words to have the same meaning." State v. Keller, 98 Wn. App. 381, 384, 990 P.2d 423 (1999), aff'd, 143 Wn.2d 267, 19 P.3d 1030 (2001), cert. denied, 534 U.S. 1130 (2002); cf. State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002) ("When the legislature uses different words within the same statute, we recognize that a different meaning is intended.").

To impose a disposition longer than the standard range, a juvenile court must find an aggravating factor, either orally or in writing. State v. S.H., 75 Wn. App. 1, 8-9, 877 P.2d 205 (1994). In other words, the statutory requirement that a court "consider"

aggravating factors is equivalent to a requirement that the court find them when they exist.

Yet N.E. and Bevins dispense with any requirement that the court enter findings on mitigating factors when they exist. This conflicts with the rule of statutory interpretation that same words used in the statute must be given the same meaning. Keller, 98 Wn. App. 381.

The approach taken N.E. and Bevins further conflicts with the overarching rationale for why findings are required. "The purpose of the requirement of findings and conclusions is to insure the trial judge has dealt fully and properly with all the issues in the case before [s]he decides it and so that the parties involved and this court on appeal may be fully informed as to the bases of his decision when it is made." In re Det. of LaBelle, 107 Wn.2d 196, 218-19, 728 P.2d 138 (1986) (citation and internal quotation marks omitted). The necessity of dealing fully and properly with all the issues before the trial court applies to mitigating and aggravating factors alike. There is no sound statutory basis for treating them differently with respect to the need for findings. The court in R.S.'s case thus erred in failing to find two mitigating factors. This failure calls into question whether the court properly assessed the need for a manifest injustice disposition.

e. Remand for a New Disposition Hearing is Required.

Manifest injustice represents a demanding standard. Rhodes, 92 Wn.2d at 760. This Court can affirm a manifest injustice finding only "if one or more of the factors supported by the record clearly and convincingly support the disposition" and this Court has "no doubt" the disposition court would enter the same disposition based solely on valid aggravating factors. S.H., 75 Wn. App. at 12; see also, State v. K.E., 97 Wn. App. 273, 284-85, 982 P.2d 1212 (1999) (rejection of two mitigating factors on appeal required remand for a new disposition hearing); State v. Bourgeois, 72 Wn. App. 650, 664, 866 P.2d 43 (1994) (reversal required where trial court placed "significant weight" on invalid factors); State v. Gutierrez, 37 Wn. App. 910, 914-15, 684 P.2d 87 (1984) (juvenile's criminal history standing alone did not support manifest injustice disposition).

The state cannot meet that standard here. Although this Court is by now familiar with a disposition court's boilerplate language asserting the crystal-ball claim it would impose the same disposition based solely on factors this Court might affirm on

appeal,⁷ the trial court made no such claim here. RP 24-28. This trial court instead recognized this kind of disposition was particularly “unusual” for it when the parties had reached an agreed resolution. RP 24. Affirmance is therefore unjustified on this record.

2. THE COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS AND CONCLUSIONS TO SUPPORT THE DISPOSITION.

When a trial court imposes a manifest injustice disposition, the statute requires the court to “enter[] reasons for its conclusion[.]” RCW 13.40.160(2). The governing court rule states “the disposition order shall set forth those portions of the record material to the disposition.” JuCR 7.12(e).

A plain reading of the statute and rule shows the disposition court did not comply with either. The disposition order “enters” no “reason” for its conclusion. CP 20. It does not even check a preprinted box to identify what aggravating factor or factors might have been found by the trial court. It instead marks an “x” between parenthesis to note the court had concluded a standard range

⁷ See e.g., State v. Clarke, 156 Wn.2d 880, 895, 134 P.3d 188 (2006) (noting trial court’s statement that either of the two aggravating factors, standing alone, would justify the sentence); State v. T.E.C., 122 Wn. App. 9, 20, 92 P.3d 263 (2004) (same).

disposition would “effectuate a manifest injustice,” without identifying any “reason.” CP 20.

The order also fails to identify what portions of the record might be material to the disposition. CP 19-25.

Arguably, the statute and rule used to mean something. See e.g., State v. Strong, 23 Wn. App. 789, 794, 599 P.2d 20 (1979) (early case reviewing the Juvenile Justice Act and manifest injustice dispositions; although the trial court did not follow the “preferable practice,” this Court stated “we will insist upon compliance with the rule hereafter”). Despite that statement, disposition courts no longer have to provide written support for a manifest injustice disposition. State v. E.J.H., 65 Wn. App. 771, 775-76, 830 P.2d 375 (1992) (written findings of fact and conclusions of law are not required; appellate court may review disposition court’s oral ruling).

But the practical reality of appellate “review” shows the E.J.H. exception can only apply if the court’s oral ruling is sufficiently clear. E.J.H., at 775 (citing State v. Radcliff, 58 Wn. App. 717, 794 P.2d 869 (1990) (reasoning “the lack of written findings does not preclude appellate review if the trial court’s oral ruling sets forth the facts upon which it relies”). An appellate court

cannot “enter” its own “reasons” to support a manifest injustice disposition when the trial court record is not sufficiently clear to permit appellate “review.”

This record is sufficiently clear to allow one remedy: reversal and remand for a new disposition hearing. See argument 1, supra. One part of the court’s oral ruling was clear, e.g. the court’s improper reliance on uncharged offenses. RP 25 (quoted in section 1b, supra). The ruling is not sufficiently clear to permit affirmance, however. Written findings should be required here. See State v. Head, 136 Wash.2d 619, 622-25, 964 P.2d 1187 (1998) (discussing reasons for written findings, and why they are necessary for fair appellate review).

D. CONCLUSION

For the reasons stated, this Court should reverse the disposition and remand for a new disposition hearing.

DATED this 30th day of September, 2009.

Respectfully Submitted,

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