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No. 96894-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

M.S.,

Appellant.

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

SUPPLEMENTAL BRIEF OF PETITIONER

KATE R. HUBER
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711
katehuber@washapp.org
wapofficemail@washapp.org

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A. INTRODUCTION

M.S., a sixteen year old dependent child with no criminal record, pleaded guilty to a single misdemeanor offense in exchange for a deferred disposition. When the deferral failed, the court sentenced M.S. to the maximum permissible manifest injustice sentence. M.S. appealed his exceptional sentence, challenging the court's reliance on nonstatutory aggravating factors, the failure to provide him notice of the aggravating factors before his guilty plea, and the court's reliance on prohibited factors, as well as insufficient evidence, to impose a clearly excessive sentence.

B. ARGUMENT

The court sentenced M.S. to the maximum possible exceptional sentence – 52 weeks – for a misdemeanor offense based on five aggravating factors. Four of those factors, including M.S.'s need for treatment, are not identified in RCW 13.40.150(3)(i) as aggravating factors the legislature deems appropriate considerations for an exceptional sentence. In addition, this Court explicitly held one of those factors – the need for treatment – is an inappropriate basis on which to impose an exceptional sentence. Finally, M.S. never received notice of the State's intent to rely on any of the factors at the time he pleaded guilty.

This Court's opinion in *State v. B.O.J.* makes clear the court erred in relying on M.S.'s need for treatment as a basis for a manifest injustice sentence. 194 Wn.2d 314, 449 P.3d 1006 (2019). *B.O.J.* also supports M.S.'s argument that the court erred in relying on nonstatutory aggravating factors. Finally, *B.O.J.* supports this Court's acceptance of review even though M.S. has now served the improperly imposed exceptional sentence.

1. *B.O.J.* establishes the court erred in relying on M.S.'s need for treatment in imposing the manifest injustice sentence.

In *B.O.J.*, this Court held the finding that B.O.J. needed treatment and would not get it in the community was an inappropriate basis on which to impose a manifest injustice sentence. 194 Wn.2d at 325. The Court found the existence and extent of a juvenile's substance abuse and mental health issues and the need to treat those issues is not a serious and clear danger to society that justifies an exceptional sentence. *Id.* at 325-28. Therefore, the fact that treatment for such issues may benefit a child and that a child would receive treatment for such issues while serving a manifest injustice sentence cannot be used as a reason to extend a child's incarceratory sentence. *Id.* at 325-26, 326 n.7.

In addition to rejecting a juvenile's need for treatment as a basis for an exceptional sentence, *B.O.J.* makes clear a manifest injustice is not

permissible because it is in the juvenile's best interest or because it could help him. Moreover, as Justice González recognized in his concurrence, "[T]he misguided belief that incarceration is good for children may not be the basis for a manifest injustice disposition. Incarceration harms children." 194 Wn.2d at 332 (González, J., concurring).

B.O.J. prohibits a court from relying on a child's need for treatment or his inability to get treatment in the community to justify imposition of a manifest injustice sentence. Here, the court explicitly relied on M.S.'s need for treatment and services and his failure to get them through the deferred disposition as a reason to impose an exceptional sentence. CP 32, 40-43; RP 154-56. In affirming, the Court of Appeals, too, relied on the belief that providing necessary treatment, services, and supervision may support a manifest injustice sentence. Ruling at 1, 7-11, 14. Because this is contrary to this Court's holding in *B.O.J.*, the Court should accept review and reverse the imposition of the manifest injustice sentence.

In addition, *B.O.J.* recognized the court's "bare conclusion" in its findings of fact and conclusions of law that another factor was sufficient to support the manifest injustice sentence was insincere in light of the record. *B.O.J.*, 194 Wn.2d at 329. The Court noted that, although the juvenile court claimed either factor supported a manifest injustice sentence, the

court focused on the child's treatment needs in justifying the sentence. *Id.* at 328-31. Therefore, this Court found the perfunctory statement insufficient to insulate the sentence from challenge.

Here, as in *B.O.J.*, the court's findings of fact contain a boilerplate sentence claiming, "Any of the bases as set forth above, standing alone, is sufficient for the Court to impose a Manifest Injustice Upward." CP 43. Here, as in *B.O.J.*, this "bare conclusion" is belied by the record.

In the written findings, the court related all of the aggravating factors to M.S.'s treatment and services needs. For example, the court tied M.S.'s high risk to reoffend to his "serious drug/alcohol addiction." CP 40 (FOF 6). The court based M.S.'s lack of parental control on his "tak[ing] advantage of the freedoms provided to him by using drugs." CP 40-41 (FOF 7). The court found M.S. was unable "to obtain the services he needs if he remains in the community" because of his "ongoing drug/alcohol addiction." CP 42 (FOF 9). And the court found local sanctions were too lenient because 30 days in jail "will not provide any meaningful opportunity for services or rehabilitation" for the "drug/alcohol treatment that he desperately needs." CP 42-43 (FOF 11).

The court impermissibly imposed a manifest injustice sentence on M.S. because he needed treatment. The need for treatment permeated the court's findings and ruling. This is contrary to the holding of *B.O.J.* The

Court should accept review and reverse the imposition of the manifest injustice sentence.

2. *B.O.J.* confirms courts are bound by the sentencing scheme established by the legislature in the Juvenile Justice Act and may only impose manifest injustice sentences where they are supported by statutorily identified aggravating factors.

B.O.J. also supports M.S.’s argument that the court exceeded its sentencing authority in imposing a manifest injustice sentence based on nonstatutory aggravating factors.¹ Motion for Discretionary Review (MDR) at 2, 7-12 (issue 1). Juvenile courts lack inherent authority to devise sentences other than those specifically authorized by statute. *State v. Bacon*, 190 Wn.2d 458, 463-64, 415 P.3d 207 (2018). *B.O.J.* recognized a juvenile court’s authority to impose an exceptional sentence is confined to cases in which the imposition of a standard range sentence presents “a serious, and clear danger to society.” 194 Wn.2d at 324 (quoting RCW 13.40.020(19)). *B.O.J.*’s adherence to the statutory scheme supports M.S.’s argument that a court may only rely on aggravating factors identified in the statute to impose a manifest injustice sentence.

Our legislature intended manifest injustice sentences for those rare circumstances where a standard range sentence fails to meet the goals of the Juvenile Justice Act (JJA) as evidenced by proof of particular

¹ Another juvenile appeal in our office presents this same issue. *State v. F.B.T.*, Case No. 36385-6-III (considered on the December 3, 2019, Division III calendar).

aggravating factors demonstrating a serious and clear danger to society. *B.O.J.* supports M.S.'s argument that juvenile courts are bound by the statutory scheme and may impose manifest injustice sentences only based on aggravating factors identified in the statute. *B.O.J.* also explicitly refers to the “*statutorily enumerated* mitigating and aggravating factors” as considerations justifying a manifest injustice sentence. 194 Wn.2d at 324 (emphasis added).

A court's authority to impose exceptional sentences is limited to the statutorily identified aggravating factor explicitly identified by the legislature. Without this limit, courts may incarcerate children longer than permissible for any reason at all, contrary to the design of the JJA.

3. M.S.'s appeal is not moot.

M.S. has finished serving the wrongfully imposed manifest injustice sentence. However, the appeal is not moot because this Court may still provide effective relief.² Release from detention does not render an appeal moot where collateral consequences still flow from the finding authorizing detention, even if the detention period is over. Because a future court might consider the fact that an exceptional sentence was

² M.S. opposed the State's motion to stay the case, arguing his case presented important issues not addressed in *B.O.J.* See Appellant's Answer to State's Motion for Stay, April 8, 2019. In addition, during the telephonic oral argument, M.S. expressed concern over a stay's potential to render the appeal moot, depending on the length.

imposed in this case as relevant to the appropriate sentence in future cases, the appeal is not moot.

In *State v. Ford*, the court acknowledged that something – even a dismissal – that is part of a juvenile’s criminal history may cause prejudice such that changing it offers relief and the appeal is not moot. 99 Wn. App. 682, 687, 995 P.2d 93 (2000). In *Ford*, the juvenile appealed a conviction but had completed his diversion sentence, and the charges had been dismissed. The court nonetheless found the appeal was not moot. “Although the case was dismissed, *the diversion remains part of Ford’s criminal history.*” *Id.* (emphasis added). The court further noted that if the juvenile won the appeal and received a dismissal under the misdemeanor compromise statute instead of a diversion dismissal, “[N]o criminal history would remain. Thus, relief may be obtained.” *Id.*

Courts also hold involuntary detention appeals are not moot, even where the person is no longer detained. In that setting, courts recognize that because the civil commitment statute permits a court to consider previous orders of involuntary commitment in determining whether the State has met its burden of proof in a current petition, reversal of an order has import even where a person is not presently detained under the order. *In re Detention of S.B.*, 7 Wn. App. 2d 337, 339 n.2, 433 P.3d 526, review

denied, 193 Wn.2d 1011 (2019); *In re Detention of M.K.*, 168 Wn. App. 621, 625-26, 279 P.3d 897 (2012).

Finally, a dependency order may not be moot even where the dependent child has turned eighteen because a dependency finding based on abuse has collateral consequences in other contexts, including administrative and licensing proceedings. *In re Dependency of H.S.*, 188 Wn. App. 654, 661-62, 356 P.3d 202 (2015).

A court could rely on the manifest injustice finding and sentence length in this case as a relevant consideration in deciding the appropriate sentence in another case, were M.S. to be charged with an offense in the future. Indeed, prosecutors often point to sentence lengths on prior convictions to justify current sentence recommendations. Because the improper manifest injustice sentence in this case could impact a sentence on a future case, this Court can still provide effective relief, and M.S.'s appeal is not moot.

4. If moot, continuing and substantial public interest supports this Court's review of the remaining issues.

If the Court finds the appeal is moot, it should nonetheless grant review because, in addition to the above arguments, M.S. raises another issue meriting review. The need to clarify a statutory scheme and the proper interpretation of the JJA is an issue of continuing and substantial

public interest. *B.O.J.*, 194 Wn.2d at 320-22 (considering manifest injustice appeal despite mootness); *State v. T.J.S.-M.*, 193 Wn.2d 450, 454-55, 441 P.3d 1181 (2019) (same). M.S. also challenges the court's ability to impose a manifest injustice sentence based on aggravating factors of which he did not have notice at the time of his plea. MDR at 2-3, 12-17 (issue 2).

Whether due process of law entitles a juvenile to notice of the aggravator factors on which a court may rely to enhance a sentence at the time he pleads guilty involves the constitutionality of the juvenile sentencing scheme. This issue presents a matter of continuing and substantial public interest that is not unique to M.S. and is likely to reoccur in any juvenile case.³ The applicability of *Apprendi*,⁴ *Blakely*,⁵ and this Court's recent decision in *Allen*⁶ to juvenile offenders presents a matter of significant constitutional import. This Court has held courts sentencing adults to exceptional sentences under the Sentence Reform Act may only rely on aggravating factors of which the defendant received timely notice. *State v. Siers*, 174 Wn.2d 269, 277-78, 274 P.3d 358 (2012).

³ At least one other juvenile appeal in our office presents this same issue. *State v. D.L.*, Case No. 96143-3 (considered on the January 23, 2020, Commissioner's calendar).

⁴ *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

⁵ *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

⁶ *State v. Allen*, 192 Wn.2d 526, 431 P.3d 117 (2018).

This Court should exercise its discretion, accept review, and decide whether due process entitles juveniles to the equivalent protection.

C. CONCLUSION

Sixteen-year-old M.S. was not “a clear, and serious danger” to society, nor did his conviction for a single misdemeanor offenses require his imprisonment for the maximum possible exceptional sentence of 52 weeks, despite a standard range of no more than 30 days. The manifest injustice sentence was inappropriate and inconsistent with the overall purpose of the JJA. For these reasons, and the reasons set forth in his motion for discretionary review, this Court should grant review. RAP 13.4 (b)(1), (3), (4).

DATED this 24th day of January, 2020.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', with a long, sweeping underline.

KATE R. HUBER (WSBA 47540)
Washington Appellate Project (91052)
Attorneys for Appellant
katehuber@washapp.org
wapofficemail@washapp.org

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
) NO. 96894-2
 v.)
)
 M.S.,)
)
 Juvenile Appellant.)

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 [Jim.Whisman@kingcounty.gov] (X) E-SERVICE VIA PORTAL
 KING COUNTY PROSECUTING ATTORNEY
 APPELLATE UNIT

[X] LENA MADDEN, DPA () U.S. MAIL
 [lena.madden@kingcounty.gov] () HAND DELIVERY
 KING COUNTY PROSECUTING ATTORNEY (X) E-SERVICE VIA PORTAL
 JUVENILE UNIT

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X _____

Washington Appellate Project
 1511 Third Avenue, Suite 610
 Seattle, WA 98101
 Phone (206) 587-2711
 Fax (206) 587-2710

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