99374-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 37240-5-III

STATE OF WASHINGTON, Respondent,

v.

M.Y.G., Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

M.Y.G. requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the published decision of the Court of Appeals filed on December 1, 2020, concluding that M.Y.G. was statutorily required to submit a DNA sample upon entering a deferred disposition in juvenile court, which he later successfully completed, resulting in the dismissal of criminal charges. A copy of the Court of Appeals' opinion is attached hereto.

III. ISSUES PRESENTED FOR REVIEW

RCW 43.43.754(1)(a) requires collection of a DNA sample from every adult or juvenile convicted of a felony, which may be entered into the FBI combined DNA index system for future testing, investigation, and prosecution. The statute does not define "conviction" for purposes of collection. A deferred disposition is a contingent resolution available in juvenile court in which the defendant stipulates guilt and agrees to abide by supervision conditions for a specified term while disposition is postponed. If the juvenile successfully completes supervision, the guilty

plea is vacated and the charges are dismissed with prejudice. RCW 13.04.240 provides that orders adjudging a juvenile offender "shall in no case be deemed a conviction of a crime." Does entry of a deferred disposition constitute a conviction requiring the collection of DNA under RCW 43.43.754(1)(a)?

IV. STATEMENT OF THE CASE

M.Y.G. requested a deferred disposition for two counts of theft of a motor vehicle. CP 1, 19, 24. The parties disputed whether entry of the deferred disposition would require M.Y.G. to submit a DNA sample or whether DNA collection was only required if he did not complete supervision and an order of disposition was entered. CP 10-12, RP 12-13. The juvenile court granted the motion and entered an order deferring disposition for nine months. CP 25-26. It ordered M.Y.G. to submit a DNA sample but stayed imposition of the order pending appeal. CP 28, RP 17. While his appeal was pending, M.Y.G. successfully completed the deferred disposition and the trial court was granted leave to enter an order dismissing the charges with prejudice. *Opinion*, at 2-3.

In its opinion affirming the imposition of DNA collection, the Court of Appeals noted that "conviction" is defined in the Sentencing Reform Act and used that definition to apply the DNA collection statute to

entry of a juvenile deferred disposition. *Opinion*, at 5. It did not evaluate whether the purpose of the Sentencing Reform Act's definition of "conviction" was consistent with the purposes of the Juvenile Justice Act, nor did it meaningfully consider whether its interpretation was consistent with the rehabilitative goals of the Juvenile Justice Act.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be granted under RAP 13.4(b)(1), (2) and (4). The Court of Appeals' ruling that juveniles must submit DNA in to a database of criminal offenders as part of a disposition that may result in the dismissal of all charges implicates privacy concerns that are of substantial public interest and fails to acknowledge the different purposes of the Juvenile Justice Act ("JJA") and the Sentencing Reform Act ("SRA") recognized in published cases of the Supreme Court and the Court of Appeals. By applying the SRA definition of "conviction" to a process arising under the JJA without evaluating whether the rehabilitative purposes of the JJA are consistent with the SRA's purposes in calculating criminal history or reconciling the SRA definition with RCW 13.04.240's prohibition against deeming juvenile adjudications to be "convictions," the Court of Appeals' opinion conflicts with published cases of the Supreme Court and the Courts of Appeal establishing when SRA terms may be applied to juvenile proceedings.

Because JJA processes specifically emphasize privacy and closure, interpreting RCW 43.43.754(1)(a) to require juveniles who demonstrate rehabilitation to submit their personal genetic information for permanent inclusion in government databases of criminal offenders is inconsistent with the JJA's rehabilitative purpose. Accordingly, review should be granted to evaluate whether entry of a juvenile deferred disposition is a "conviction" within the meaning of the mandatory DNA collection statute.

A. By summarily applying the SRA definition of a "conviction" to a juvenile proceeding, the Court of Appeals' opinion conflicts with published Supreme Court and Court of Appeals cases limiting the treatment of juvenile adjudications as convictions and requiring analysis of the respective purposes of the Acts before conflating their terms.

RCW 43.43.754(1)(a) requires collection of a biological sample for DNA identification analysis from every adult or juvenile convicted of a felony. The statute does not define "conviction." The issue presented on appeal is whether entry of a deferred disposition in juvenile court constitutes a "conviction" under RCW 43.43.754(1)(a) as a matter of statutory interpretation.

In a deferred disposition, a juvenile stipulates to the facts in the police report and acknowledges the report will be used to support a finding of guilt and disposition; subsequently, after "entry of a finding or plea of guilt," disposition is deferred pending a period of community supervision with conditions. RCW 13.40.127(3), (4), (5). If the juvenile successfully completes supervision, the finding is vacated and the case dismissed with prejudice. RCW 13.40.127(9)(b). Subsequently, when the juvenile turns 18 years old and pays full restitution, the case is sealed. RCW 13.40.127(10). Consequently, the deferred disposition acts as a contingent adjudication of guilt that proceeds to final disposition only if the juvenile does not successfully complete supervision; otherwise, it is withdrawn and the juvenile retains a clean record.

The Court of Appeals concluded that entry of a deferred disposition was a "conviction" within the meaning of RCW 43.43.754(1)(a) by applying the SRA definition of conviction found in RCW 9.94A.030(9), which includes an adjudication of guilt under Title 13 RCW. *Opinion*, at 4-5. The SRA uses convictions to calculate the offender score, which determines the standard range sentence for a criminal conviction. *See* RCW 9.94A.510, 9.94A.525.

Because the SRA and the JJA further different purposes, their statutes generally govern only their respective systems. *State v. Johnson*, 118 Wn. App. 259, 262, 76 P.3d 265 (2003), *review denied*, 151 Wn.2d 1021 (2004). Consequently, interpretations of adult criminal statutes may only be applied in juvenile proceedings when the purpose of the adult criminal statute is consistent with the purpose of the JJA. *State v. T.C.*, 99 Wn. App. 701, 705 n. 12, 995 P.2d 98 (2000) (*citing State v. Wall*, 46 Wn. App. 218, 221, 729 P.2d 656 (1986)). Here, the Court of Appeals applied an adult criminal definition of "conviction" to a juvenile proceeding without conducting any evaluation whether the purposes of the JJA and the SRA were consistent in defining convictions. As a result, its decision is in conflict with the published cases of *T.C.* and *Wall* requiring consideration of the Acts' respective purposes before applying adult standards to juvenile proceedings.

Moreover, the Court of Appeals' opinion overlooks critical distinctions between the purposes of the JJA and the SRA that shed light on the Legislature's intent to treat juvenile offenders differently than adults and limit the imposition of permanent consequences for juvenile misbehavior. Notably, because the JJA emphasizes rehabilitation and the individual needs of the offender, within the juvenile system, an adjudication of guilt is not to be deemed a conviction of a crime. RCW

13.04.240; *Johnson*, 118 Wn. App. at 262-63. Under this statute, juveniles who have been adjudicated guilty of felony offenses are not convicted of a felony crime. *See In re Frederick*, 93 Wn.2d 28, 30, 604 P.2d 953 (1980) (juvenile could not be convicted of first-degree escape since juvenile adjudication did not result in detention "pursuant to a conviction of a felony."); *Johnson*, 118 Wn. App. at 263 ("[T]he juvenile statute is properly concerned with preventing an adjudication of guilt from being considered a crime while one is still a juvenile, as this approach furthers its rehabilitative purpose.").

By contrast, the broad definition of "conviction" used in the SRA furthers the SRA's purpose of ensuring punishment that is proportionate to both the seriousness of the offense and the defendant's criminal history. *See* RCW 9.94A.010(1); *Johnson*, 118 Wn. App. at 263 ("[T]he adult statute allows consideration of prior juvenile adjudications in sentencing an individual who is now an adult and has committed a crime as an adult because the SRA is primarily concerned with punishing all adult offenders who have the same criminal history to the same extent."). Thus, treating juvenile adjudications as prior convictions for purposes of sentencing an adult offender is consistent with the SRA's goal of proportionate punishment even though treating the same adjudication as a criminal conviction of a juvenile would be inconsistent with the rehabilitative goals

of the JJA. *See Johnson*, 118 Wn. App. at 263 ("Each statute treats prior offenses in a manner appropriate to its purpose, and they are not contradictory as between the two systems.").

Consequently, the Court of Appeals' application of the SRA definition of "conviction" to the consequences of a juvenile proceeding is in conflict with *Frederick* and *Johnson*, which acknowledge the limitations in treating juvenile adjudications as criminal convictions expressly imposed by RCW 13.04.240. Simply put, the SRA treats juvenile adjudications as convictions because doing so furthers its goal of punishing adult offenders in accord with their history of criminality. By contrast, the JJA does not treat juvenile adjudications as convictions because it seeks to promote rehabilitation by allowing reformed youth to move forward in life without the stigma of a criminal record.

Review should be granted under RAP 13.4(b)(1) and (2) to address the conflicts between the Court of Appeals' opinion and published cases addressing both the procedural requirements to apply SRA provisions to juvenile cases and the substantive differences between adult convictions and juvenile adjudications.

B. Mandatory inclusion of a juvenile's DNA in databases of criminal offenders implicates significant privacy interests that undermine the JJA's rehabilitative goals.

Nonconsensual sampling of bodily fluids for DNA implicates constitutionally-protected privacy interests. *See State v. Athan*, 160 Wn.2d 354, 367, 158 P.3d 27 (2007); *Robinson v. City of Seattle*, 102 Wn. App. 795, 819, 10 P.3d 452 (2000). Furthermore, the scope of a person's privacy interest may vary depending on his or her status as an arrestee, a pretrial detainee, a prisoner, or a probationer. *State v. Surge*, 160 Wn.2d 65, 74, 156 P.3d 208 (2007). Thus, while this Court has upheld the constitutionality of the DNA collection statute as applied to convicted felons, it has also acknowledged that individuals who are not convicted or imprisoned may have greater privacy interests in their identifying information. *See id.*

In the case of juvenile offenders generally and deferred dispositions specifically, the Legislature has clearly indicated its intention to extend greater privacy protections to juveniles than it extends to adult offenders. For example, all records relating to juvenile offenses besides official court files are confidential and may not be released. RCW 13.50.050(3). Juvenile court files for nearly all offenses are eligible to be

sealed if the juvenile completes of the disposition requirements, and sealed proceedings are treated as though they had never occurred and the offender as never having been convicted. RCW 13.50.260(1)(c), (6)(a); *State v. P.M.P.*, 7 Wn. App. 2d 633, 643-44, 434 P.3d 1083 (2019). The Legislature adopted these provisions recognizing the primary goal of the juvenile justice system is rehabilitating and reintegrating former juvenile offenders as active, law-abiding, and contributing members of their communities. Laws of Washington Ch. 175, § 1(1) (63rd Leg. 2014). By contrast, processes afforded to vacate adult convictions are more restrictive and are discretionary with the court. *See* RCW 9.94A.640; *State v. Kopp*, __ Wn. App. 2d __, 475 P.3d 517, 520 (Nov. 9, 2020).

The Court of Appeals rejected the concern that collecting the DNA of juveniles who enter deferred dispositions implicated privacy considerations because "DNA databases are not public." *Opinion*, at 6. But this dismissal overlooks legitimate concerns that including the DNA of juvenile offenders in investigative databases is inconsistent with the Legislature's rehabilitative goals. Any database of identifying information poses a risk of abuse that exposes the child to governmental harassment or oppression and may stigmatize the child in the eyes of law enforcement by grouping him with adult criminal offenders. *See* Monteleoni, Paul M., *DNA Databases, Universality, and the Fourth Amendment*, 82 N.Y.U. L.

REV. 247, 254-55 (2007). Furthermore, the knowledge that the juvenile's DNA is available to police for investigative purposes may chill lawful, prosocial behavior. *Id.* at 255-56 (noting that mass recovery of DNA could permit police to sweep areas such as mosques or political offices, chilling lawful behavior of those in the database). Indeed, not only is there no evidence of any deterrent or rehabilitative effect from including juveniles in mandatory DNA databases, to the contrary, it is possible that "DNA collection increases recidivism and negatively impacts the life-course of juveniles." Lapp, Kevin, *Compulsory DNA Collection and a Juvenile's Best Interest*, 14 U. MD. L. J. OF RACE, RELIGION, GENDER AND CLASS 50, 55 (2014). Rather than offering the juvenile offender a fresh start, mandatory DNA collection "reduces the chances the juvenile can shake his youthful misdeed and avoid further contact with law enforcement." Lapp, Kevin, *As Though They Were Not Children: DNA Collection from Juveniles*, 87 TULANE L. REV. 435, 476 (2014).

Consequently, the Court of Appeals' interpretation that a "conviction" for mandatory DNA collection purposes includes a juvenile who enters a deferred disposition implicates significant privacy concerns and rehabilitative interests of children that are of substantial public interest. This Court should accept review under RAP 13.4(b)(4) to evaluate whether the Court of Appeals' interpretation properly accounts

for the unique status of juveniles and the particular objectives of the deferred disposition alternative.

VI. CONCLUSION

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(1), (2), and (4) and this Court should enter a ruling that M.Y.G. was not required to submit a DNA sample under RCW 43.43.754(1)(a) upon entry of his deferred disposition.

RESPECTFULLY SUBMITTED this 30 day of December, 2020.

TWO ARROWS, PLLC

ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

M.Y.G.
12709 N. Palomino Lane
Spokane, WA 99208

And, pursuant to prior agreement of the parties, by e-mail through the Court of Appeals' electronic filing portal to the following:

Larry D. Steinmetz
Deputy Prosecuting Attorney
Spokane County Prosecuting Attorney
SCPAAppeals@spokanecounty.org

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 30 day of December, 2020 in Kennewick, Washington.

Andrea Burkhart

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. M.Y.G.,[1] Appellant.	)	No. 37240-5-III PUBLISHED OPINION

LAWRENCE-BERREY, J. — Must a juvenile offender who receives a deferred felony disposition provide a deoxyribonucleic acid (DNA) sample?

RCW 43.43.754(1)(a) requires DNA to be collected from every adult or juvenile convicted of a felony. RCW 9.94A.030(9) defines "conviction" as including a finding of guilty. Because a trial court must enter a finding of guilty before ordering a deferred disposition, we answer yes to the above question.

[1] To protect the privacy interests of the minor, we use his initials throughout this opinion. General Order for the Court of Appeals, *In re Changes to Case Title*, (Aug. 22, 2018), effective Sept. 1, 2018.

APPENDIX

FACTS

The State charged M.Y.G., a minor, with two counts of theft of a motor vehicle. Theft of a motor vehicle is a felony. RCW 9A.56.065(2). M.Y.G. moved for a deferred disposition, but objected to submitting a DNA sample.

Judge Rachelle Anderson of the Spokane County Superior Court, Juvenile Division, presided over M.Y.G.'s deferred disposition hearing. The court granted M.Y.G.'s motion for a deferred disposition, but overruled his objection. In doing so, it entered findings of guilty on both of M.Y.G.'s charged offenses, but deferred disposition for nine months. In addition, it stayed, pending appeal, its requirement that M.Y.G. provide a DNA sample. M.Y.G. timely appealed.

POSTAPPEAL PROCEDURE

M.Y.G. recently completed the terms of his deferred disposition. The State filed a motion with this court to permit the trial court to enter an order of dismissal with prejudice. The State also asked that we decide the issue presented even though the appeal may be moot. M.Y.G. responded and agreed with the State.

An appellate court may decide an issue in a technically moot case if it concerns a matter of continuing and substantial public interest and is capable of repetition yet easily evades review. *Tacoma News, Inc. v. Cayce*, 172 Wn.2d 58, 64, 256 P.3d 1179 (2011).

Here, there is no decisional authority on the issue presented, yet it impacts most, if not all, felony disposition orders entered in juvenile courts across this state. The issue also easily evades review, due to the 12-month limitation on the term of juvenile disposition orders. *See* RCW 13.40.127(2).

By letter order, we granted the parties' request to allow the trial court to dismiss the case with prejudice. And even though this case is technically moot, we agreed to decide whether the trial court improperly required M.Y.G. to provide a DNA sample.[2]

ANALYSIS

We first discuss how a deferred disposition works. A deferred disposition is a sentencing alternative that allows a juvenile offender to not contest the State's facts yet avoid significant consequences. When granting a deferred disposition, the court reviews a statement of uncontested facts and, if the facts are sufficient, finds the juvenile guilty but defers disposition pending satisfaction of court-ordered conditions. RCW 13.40.127. If the juvenile satisfies the conditions by the end of the supervision period, the conviction

[2] The State's motion also asked that we allow the trial court to retain jurisdiction to the extent necessary to effectuate relief, if any, granted on appeal. M.Y.G. seemingly agreed to this too, so our letter order reflects this agreement.

We are not privy to the discussion between the parties and the court when the order of dismissal with prejudice was entered. We grant the trial court discretion, based on whatever discussion or additional order was entered, to effectuate relief consistent with this decision.

is vacated and the case is dismissed with prejudice. *State v. D.P.G.*, 169 Wn. App. 396, 399, 280 P.3d 1139 (2012).

RCW 43.43.754(1) directs that DNA samples be collected from persons convicted of certain crimes. For instance, one provision provides: "A biological sample must be collected for purposes of DNA identification analysis from . . . [e]very adult or juvenile individual *convicted* of a felony." RCW 43.43.754(1)(a) (emphasis added). DNA collection from a juvenile convicted of a felony has been required since 1994. *See* LAWS OF 1994, ch. 271. DNA collection from an adult convicted of a felony has been required since 1990. *See* LAWS OF 1989, ch. 350.

We next determine whether a juvenile subject to a deferred disposition order has been "convicted" within the meaning of the quoted provision. The term "convicted" is not defined in chapter 43.43 RCW. But "conviction" is defined in the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW.

When the legislature uses a word in a statute, and subsequently uses the same word in a different statute, the word may be deemed to have been used in the same sense. *See Pub. Util. Dist. No. 1 of Okanogan County v. State*, 182 Wn.2d 519, 537-38, 342 P.3d 308 (2015). Here, the legislature defined "conviction" in the SRA and subsequently used "convicted" in RCW 43.43.754(1)(a). We, thus, use the SRA definition of "conviction."

The SRA defines "conviction" as "an adjudication of guilt pursuant to Title 10 or [chapter] 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty." RCW 9.94A.030(9). A deferred disposition requires a court to make a finding of guilty or the juvenile to plead guilty. *See* RCW 13.40.127(4). Here, the trial court found M.Y.G. guilty of the two charged felony offenses. This constitutes a "conviction" within the meaning of RCW 9.94A.030(9). M.Y.G. was thus "convicted" when the trial court found him guilty and entered the deferred disposition order.

M.Y.G. argues the legislature's interest in preserving juvenile offenders' privacy is frustrated by requiring DNA collection even though successful completion of the deferred disposition order results in dismissal of the case. He argues DNA collection should occur only if the juvenile fails to comply with the order and deferment is revoked. We disagree.

Juveniles receive many protections not available to adult offenders. The Juvenile Justice Act of 1977, chapter 13.40 RCW, was intended to establish a system capable of responding to the needs of youthful offenders while holding them accountable for their offenses. *State v. S.J.C.*, 183 Wn.2d 408, 416, 352 P.3d 749 (2015). "The primary goal of the Washington state juvenile justice system is the rehabilitation and reintegration of former juvenile offenders." LAWS OF 2014, ch. 175, § 1. Those interests—rehabilitation and reintegration—outweigh the need for public availability of juvenile records. Those

interests also support the administrative sealing of deferred disposition proceedings if and when the offender completes all conditions.

We recognize the importance of protecting a juvenile's privacy. Juveniles understandably do not want their offenses widely known by their communities. But unlike juvenile court records, which would unduly harm juvenile offenders if made public, DNA databases are not public. Biological samples "shall be used solely for the purpose of providing DNA or other tests for identification analysis and prosecution of a criminal offense or for the identification of human remains or missing persons." Former RCW 43.43.754(7) (2019). We are not convinced the legislature intended to exempt juveniles with deferred felony dispositions from DNA collection, given that the DNA database is not public and is used solely for identification purposes.

M.Y.G. next contends that the structure of RCW 43.43.7541 suggests collection of DNA occurs at sentencing, but not before. That statute requires a DNA collection fee to be imposed at sentencing. Because fees fund the DNA collection program, he argues it would be an absurd result to require samples without a payment mechanism. We are similarly unconvinced by this argument.

The collection of DNA is an independent requirement imposed on convicted individuals. RCW 43.43.754(1)(a) mandates DNA collection from any adult or juvenile

convicted of a felony. The conviction triggers the requirement. Conversely, a $100 collection fee is part of the offender's sentence. RCW 43.43.7541. The sentencing triggers the fee. Juveniles who successfully complete deferred dispositions avoid legal financial obligations, including a DNA collection fee. The DNA collection program is funded by countless other offenders. It is not absurd that the legislature intended to collect DNA at conviction and collect DNA fees at sentencing.

We conclude that deferred felony dispositions are "convictions" for purposes of the DNA collection statute. The trial court did not err in requiring M.Y.G. to submit to DNA collection.

Affirmed.

Lawrence-Berrey, J.

WE CONCUR:

Korsmo, A.C.J.

Fearing, J.

BURKHART & BURKHART, PLLC

December 30, 2020 - 11:55 AM

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